Supreme Court, U.S.
FILED

No. 09-857 2010

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In The

Supreme Court of the United States

ANNE DOYLE,

Petitioner,

v.

LELAND GRASKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The circuit courts and district courts are split regarding the issue in this case: is there a remedy for loss of consortium under general maritime law? In some circuits damages for loss of consortium are available. In other circuits damages for loss of consortium are not available. This case will allow this Court to resolve this conflict among the lower courts, and to clarify these questions of general maritime law:

1. Whether, pursuant to *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 10 S.Ct. 1673 (1980), loss of consortium caused by a nonfatal injury to a nonseafarer is a remedy under general maritime law.

2. Whether, pursuant to *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619 (1996), state law remedies are applicable in maritime cases where there is no federal statute that specifies the appropriate relief, and where the injured party is a nonseafarer.

3. Whether Graske waived his defense of failure to state a claim upon which relief can be granted.

PARTIES TO THE PROCEEDING BELOW

The only parties involved in the trial and subsequent appeal were Daniel Doyle and Anne Doyle, Plaintiffs, and Leland Graske, Defendant.

Although the Eighth Circuit listed Third Party Defendants as parties, none of the Third Party Defendants were involved in the relevant proceedings below. The Third-Party Complaint against Jason Haynes was dismissed on October 5, 2007. Caribe Inflatables USA, Inc. and Kirk Marine were both dismissed from this action on September 27, 2006.

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CITATIONS TO JUDGMENTS AND OPINIONS BELOW

This case was tried in the United States District Court for the District of Nebraska, Chief Judge Joseph Bataillon presiding. *Doyle v. Graske*, 565 F. Supp.2d 1069 (D. Neb. 2008) (App. 20-58). After a judgment in favor of the Plaintiffs, the trial court denied Defendant's Motion to Amend Findings of Fact and Conclusions of Law, or for a new trial. *Doyle v. Graske*, 2008 WL 3539269 (D. Neb. 2008) (App. 59-67). Those decisions were appealed to the United States Court of Appeals for the Eighth Circuit. A panel of that Court – Chief Judge Loken, Circuit Judge Colloton, and Circuit Judge Hansen – affirmed in part and reversed in part. That decision, as amended, is *Doyle v. Graske*, 579 F.3d 898 (8th Cir. 2009) (App. 1-19).

BASIS FOR JURISDICTION

The Court of Appeals entered its judgment and opinion on September 2, 2009. After timely Petitions for Rehearing were filed, the Court denied the Petitions for Rehearing on October 22, 2009 (App. 68-69). In that Order the Court noted that Circuit Judges Bye and Shepherd would grant the Petition for Rehearing En Banc filed by Appellee Anne Doyle which raised the same issues as this Petition.

28 *U.S.C.* §1254(1) confers jurisdiction on this Court to review the judgment of the Eighth Circuit Court of Appeals.

STATUTES INVOLVED IN CASE

28 *U.S.C.* §1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 *U.S.C.* §1333(1):

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The following statutes are not applicable on the facts, but are discussed in the Argument section below.

33 *U.S.C.* §903(a):

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only

if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

46 *U.S.C.* §30104:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 *U.S.C.* §30302:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 *U.S.C.* §30303:

The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the

action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.

46 *U.S.C.* §30308:

(a) State law. – This chapter does not affect the law of a State regulating the right to recover for death.

(b) Internal waters. – This chapter does not apply to the Great Lakes or waters within the territorial limits of a State.

STATEMENT OF THE CASE

This case is about the loss of consortium and society suffered by a wife, Anne Doyle, when her husband, Daniel Doyle, sustained a permanent brain injury in a boating accident. Daniel Doyle was not a seaman, nor was he a longshoreman. He was seriously injured, but he did not die. His injuries did not occur in territorial waters.

On the morning of October 31, 2003 Daniel Doyle sustained a permanent brain injury when he was run over by a boat in the waters off of Grand Cayman Island. The boat was owned and operated by Leland Graske. See, generally, App. 2-4.

Due to the brain injury, Daniel Doyle has been unable to work. He has memory and cognition

problems. His behavior has become emotional and erratic.

Anne and Daniel Doyle's marriage has been transformed. Instead of having a loving, caring husband she can rely on – a partner – Anne is now Daniel's caretaker. Anne Doyle has lost the care, companionship, and comfort that Daniel Doyle had provided her, and which she expected to benefit from for the rest of her life. See, generally, App. 55-58.

This case was originally filed in the state courts of Nebraska. Graske removed the case to the United States District Court for the District of Nebraska. The Doyle's consented to removal, and did not seek a remand to state court. Thus, the district court properly exercised jurisdiction because the Doyle's waived any objections to removal. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344 (1972),

After a trial to the court, the court found that Leland Graske was negligent, and that his negligence caused Daniel Doyle's injuries. The Court entered a judgment in favor of Daniel Doyle for his damages, and in favor of Anne Doyle for her loss of consortium.

The Eighth Circuit Court of Appeals affirmed the findings of negligence, causation, and the judgment in favor of Daniel Doyle. However, the court reversed the judgment in favor of Anne Doyle because it decided that she did not have a claim loss of consortium under general maritime law. App. 9, 11, 18.

ARGUMENT

The circuit courts are split regarding the issues in this case. In the First, Second, and Third Circuits damages for loss of consortium can be recovered. In the Fifth, Ninth, and Eleventh Circuits, and now the Eighth, loss of consortium damages are not recoverable. Thus, whether a spouse can recover damages for loss of consortium depends on where she is able to file her cause of action. This Petition should be granted so that this Court can resolve this conflict between the circuit courts, and establish uniformity regarding remedies in admiralty law cases.

I. THERE IS A SPLIT IN THE DECISIONS OF THE CIRCUIT COURTS

Before examining the split between the circuit courts, it is necessary to identify the three federal statutes that provide remedies for injury or death in maritime law: the *Jones Act*, 46 *U.S.C.* §30104 (hereinafter "*Jones Act*"), the *Longshore and Harbor Workers' Compensation Act*, 33 *U.S.C.* §§901-950 (hereinafter "*LHWCA*"), and the *Death on the High Seas Act*, 46 *U.S.C.* §§30301-30308 (hereinafter "*DOHSA*").

When a case comes within the parameters of one of these statutes, then the decision is controlled by the statutory language. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1978). When a case – such as this case – is not controlled by one of these statutes, then principles of general maritime

law apply. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 121 S.Ct. 1927 (2001).

A. The First, Second, and Third Circuits Allow Damages for Loss of Consortium

The First Circuit affirmed an award of damages, including loss of society, to an injured party's son in *Lyon v. Ranger III*, 858 F.2d 22 (1st Cir. 1988); a wrongful death action under general maritime law. See also *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995) where the court affirmed an award of punitive damages which, like loss of consortium damages, are considered nonpecuniary damages. The court's rationale in *F/V Seafarer* was that if *DOHSA* and the *Jones Act* do not apply, then nonpecuniary relief is available. This rationale applies to damages for loss of consortium as well.

The Second Circuit considered loss of consortium damages in *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2nd Cir. 1994). The court held that maritime law permits the recovery of damages for loss of society (consortium). *Id.* at 43 F.3d 23. This Court reversed the award of damages for loss of society because *DOHSA* applied. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S.Ct. 629 (1996). However, the initial determination that loss of society damages are available under general maritime law is still the law in the Second Circuit. *Saunders v. Cunard Line Ltd.*, 1995 WL 329323 (S.D.N.Y. 1995);

Wartman v. Commodore Cruise Line, Ltd., 100 F.3d 943, 1996 WL 47964 (2nd Cir. 1996).

Long ago the Third Circuit recognized a claim for loss of consortium in admiralty cases. *New York & Long Branch Steamboat Co. v. Johnson*, 195 F. 740 (3rd Cir. 1912). More recently, in *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3rd Cir. 1986), the court denied loss of consortium damages for a child whose parent was injured. However, in that opinion it is clear that a spousal claim for loss of consortium is cognizable under maritime law. Also, in *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3rd Cir. 1994), the court held that a state remedy for loss of consortium is consistent with principles of general maritime law. See also *Matheny v. Tennessee Valley Authority*, 557 F.3d 311 (6th Cir. 2009).

B. The Fifth, Eighth, Ninth, and Eleventh Circuits Do Not Allow Damages for Loss of Consortium

In this case the Eighth Circuit Court aligned itself with decisions by the Fifth and Ninth Circuits that general maritime law does not provide a remedy for loss of consortium. *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994); *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994). See also *Tucker v. Fearn*, 333 F.3d 1216 (11th Cir. 2003).

Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119 (5th Cir. 1994) involved injuries to a longshoreman on

the high seas. The case did not involve claims against the employer. Rather, the claims were asserted against a negligent third party. The court denied recovery for loss of consortium because it decided that such damages were not available under general maritime law.

In *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), the circumstances were similar to this case. The Ninth Circuit held that loss of consortium damages are unavailable as a remedy under general maritime law. In *Chan* the Ninth Circuit never addressed the conflict between its decision and this Court's decision in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980). The Ninth Circuit also ignored the fact that this Court accepted a lack of uniformity between *DOHSA,* the *Jones Act*, and its holding in *Alvez*. Thus, the *Chan* decision has been criticized. See, e.g., Thomas J. Schoenbaum, 1 *Admiralty and Mar. Law*, §5-16 (4th ed.).

Anne Doyle would be allowed to recover her damages for loss of consortium in the First, Second, and Third Circuits. However, the Eighth Circuit denied her recovery for her damages. The Fifth, Ninth, and Eleventh Circuits would deny her recovery as well. This lack of uniformity is untenable. This Court should grant this Petition to resolve this split among the circuit courts, and supply uniformity on this issue in maritime law.

II. LOSS OF CONSORTIUM DAMAGES ARE AVAILABLE UNDER GENERAL MARITIME LAW

Daniel Doyle was not a seaman, nor was he a maritime worker. He was a nonseafarer. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, at 205, n.2, 116 S.Ct. 619 (1996). Therefore, neither the *Jones Act* nor the *LHWCA* control the outcome of this case. See *Garris*, supra at 532 U.S. 817-818, citing *Alvez*, supra. Daniel Doyle did not die so *DOHSA* does not apply. See *Garris*, supra at 532 U.S. 818, quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970). Thus, none of the maritime statutes control, and this case presents issues of general maritime law.

This Court has never specifically addressed the circumstances presented by this case: loss of consortium for injury (not death), to a nonseafarer, in nonterritorial waters (the high seas). However, in other cases that were not controlled by the maritime statutes, this Court held that loss of consortium damages are an available remedy. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980). See also *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, at 2630, n.21 (2008).

Some of the lower courts have followed these decisions, others, such as the Eighth Circuit in this case, have not. Thus, one of the issues presented by

this case is the continuing viability of *Gaudet* and *Alvez*.

In *Gaudet* this Court held that loss of consortium damages are an available remedy in a wrongful death action under general maritime law. In *Alvez* this Court held that the decision in *Gaudet* extended to nonfatal injuries. Thus, under general maritime law, there is a remedy for loss of consortium in both injury cases and death cases. The rationale in both cases is that, where there is no statute to the contrary, common law principles apply.

This Court applies the same rationale to other issues of admiralty law. In *Garris*, supra, since there was no statute to the contrary, this Court held that the *Moragne* wrongful death action extends to cases involving negligence. Likewise, in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008) this Court noted that historically admiralty courts develop and apply remedies where there are no controlling statutes. *Id.* at 128 S.Ct. 2630, n.21. Finally, in *Atlantic Sounding Co. Inc. v. Townsend*, 129 S.Ct. 2561 (2009), this Court held that, since the *Jones Act* did not preclude them, punitive damages are an available remedy. These opinions support the rationale of *Gaudet* and *Alvez* that common law remedies are available unless there is congressional action to the contrary.

The rationale behind *Gaudet*, *Alvez*, and other maritime cases is clear. This rationale has been applied in the First, Second, and Third Circuits. However, the Eighth Circuit, following the Fifth,

Ninth, and Eleven Circuits, did not follow this Court's rationale in this case. It is unclear why these courts do not follow this Court's lead, but it is clear that their failure to do so has created a split of decisions between the circuits.

The issue in this case is whether there is a remedy for loss of consortium when there is a nonfatal injury to a nonseafarer in non-territorial waters. There is no statute addressing this issue. In *Alvez* this Court held that loss of consortium damages were available as a remedy for a nonfatal injury under general maritime law. However, as reflected in the conflict between the trial court and the Eighth Circuit in this case, there is conflict and confusion in the lower courts regarding whether *Alvez* is still good law. A decision in this case would resolve this conflict, and help to clarify issues related to remedies under general maritime law.

A. *Higginbotham* and *Miles* Do Not Control the Decision in this Case

The lower courts that reject the remedy for loss of consortium rely on two decisions by this Court. Unlike this case, both cases were controlled by statute. This case allows this Court to decide whether some lower courts are justified in extending the holdings in these cases beyond their original scope.

The first case is *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1978). Since *Higginbotham* involved death on the high seas, general

maritime law was preempted by *DOHSA*. However, that preemption extends only to those cases where *DOHSA* applies. *Townsend*, supra at 129 S.Ct. 2571, n.6 (2009); Accord *Alvez*, supra at 446 U.S. 282. *DOHSA* does not apply to this case.

Some lower courts, including the Eighth Circuit, fail to recognize this limit on the decision in *Higginbotham*. Contrary to well recognized principles of statutory construction, some lower courts " . . . attribute words to Congress that it has not written." *Townsend*, supra at 129 S.Ct. 2575. See also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, at 216-218, 122 S.Ct. 708 (2002). As a result, some lower courts have extended *DOHSA* and *Higginbotham* to injury cases, such as this, where they do not apply.

The second case is *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990). In the interest of uniformity, courts in some circuits have interpreted *Miles* as limiting recovery in **all** injury and death cases to the remedies provided in the *Jones Act* and by *DOHSA*. This interpretation is too broad.

"The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." *Townsend*, supra at 129 S.Ct. 2574. This principle is applied by the First, Second, and Third Circuits, but it is ignored by the Fifth, Eighth, Ninth, and Eleventh Circuits.

III. A STATE LAW REMEDY SHOULD BE APPLIED IN THIS CASE

In the Amended Complaint, Daniel and Anne Doyle prayed for judgment against Leland Graske for damages consistent with general maritime law and the law of the State of Nebraska. Under Nebraska law, damages for loss of consortium are available as a remedy in negligence actions. See, e.g., *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974).

In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619 (1996) this Court held that state remedies could be applied in a maritime wrongful death action. "Traditionally, state remedies have been applied in accident cases of this order – maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade." *Id.* at 516 U.S. 202. Likewise, in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, at 373-374, 79 S.Ct. 468 (1959), this Court pointed out that admiralty law incorporates state rules and remedies in various types of cases. See also, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368 (1955); *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981 (1994).

These cases instruct courts sitting in admiralty to look to state remedies where there is no federal statute or policy to the contrary. Since this case involves Nebraska citizens, and there is no federal statute to the contrary, applying Nebraska's remedy for loss of consortium would do nothing to undermine admiralty law. See *Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668, at 672 (7th Cir. 2008) (State law is preempted by maritime law only if it would undermine admiralty law.)

The circumstances regarding maritime law are the same in this case as they were in *Calhoun*: no federal statute specifies the appropriate relief, and Daniel Doyle was not a seaman, longshore worker, or a person otherwise engaged in a maritime trade. Thus, the outcome should also be the same. Nebraska law should apply, and Anne Doyle should be allowed to recover her damages for loss of consortium.

IV. GRASKE WAIVED HIS DEFENSE OF FAILURE TO STATE A CLAIM

The first time Graske raised the issue that Anne Doyle's cause of action failed to state a claim was in his post-verdict Motion. App. 59-60. It was not raised in his Answer. It was not raised as an issue during the Pre-Trial Conference, nor in the Proposed Findings of Fact and Conclusions of Law, and there was no argument in Graske's Trial Brief. Also, no objections were asserted during the trial when Plaintiff

adduced evidence regarding the loss of consortium damages.

Pursuant to the *Federal Rules of Civil Procedure*, Graske waived his defense that loss of consortium damages are not available in this case. *F.R.Civ.P.* 8(b)(1&6), 8(c), 12(b), and 12(h). This Court should exercise its supervisory powers, and direct the Eighth Circuit to enforce the Federal Rules, as they are written.

CONCLUSION

The issue of remedies under general maritime law is an important part of this Court's admiralty jurisdiction. However, there is a split and lack of uniformity between the circuits regarding the remedy for loss of consortium.

The circuit courts are split regarding the continuing viability of *Gaudet* and *Alvez*. There is a significant split regarding the scope of *Higginbotham* and *Miles*. In their attempts to reconcile the decisions in *Alvez*, *Miles*, and *Garris*, the lower courts have reached different conclusions.

This Court should grant this Petition for a Writ of Certiorari because a decision on the merits in this case would provide clarity and direction to the lower

courts regarding an important issue of federal law: the remedies available under general maritime law.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3144

Daniel Doyle; Anne Doyle, Plaintiffs/Appellees, v. Leland Graske, Defendant/Appellant, v. Jason R. Haynes; Caribe Inflatables USA, Inc., Kirk Marine, Third Party Defendants.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: April 16, 2009
Filed: September 2, 2009
Amended: October 21, 2009

Before LOKEN, Chief Judge, HANSEN and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Daniel Doyle suffered injuries while he was a passenger on a boat owned and operated by Leland Graske. Doyle and his wife brought an action in Nebraska state court, claiming that Graske was negligent in his operation of the boat. Graske removed the case to federal district court, invoking admiralty jurisdiction. Removal based on admiralty jurisdiction was improper under 28 U.S.C. § 1441, *see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959), but the Doyles waived their objection to improper removal by failing to seek a remand to state court, and the district court properly exercised jurisdiction over claims that could have been brought originally in federal court. *See Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001). The district court, sitting without a jury, found that Doyle's injuries were caused by Graske's negligence, and awarded compensatory damages to Doyle, as well as loss-of-consortium damages to his wife, Anne. We affirm the district court's judgment in favor of Daniel Doyle, but reverse its award of loss-of-consortium damages to Anne Doyle.

I.

On October 31, 2003, Graske and two friends, Daniel Doyle and Robert Van Hook, decided to go fishing in the waters off the coast of Grand Cayman Island, where Graske owned a vacation home. The three set out on Graske's inflatable boat at around 10:30 a.m. The boat was fourteen feet long, with a

seventy-horsepower engine and room for six passengers. It featured two seats at the stern (or rear), two more at midship, and a cushion for two passengers at the bow (or forward end). Both seats at the stern faced forward and included backrests. The stern seat on the starboard side (*i.e.*, the right side while looking forward) was known as the "helm seat" because of its position opposite the boat's steering wheel, located on a console at midship. The forward side of the console functioned as a backrest for the starboard midship seat. The other midship seat (on the port, or left, side) and the bow cushion seats did not have backrests, and passengers sitting on the latter had to ride facing the rear. An inflatable tube formed most of the boat's hull, and there were hand straps along the top of the tube for passengers sitting at midship or in the bow.

From the helm seat, Graske steered the boat slowly through the no-wake zone – a zone extending two hundred yards from shore in which boats are prohibited from traveling above five miles per hour. When the boat was past the zone, Graske said, "Here we go," or words to that effect, and began accelerating. As the boat came on plane – that is, reached a speed at which its hull was no longer displacing the water, but skimming across it – a nylock nut came loose from the boat's steering system, causing the system to malfunction and the boat to turn abruptly and sharply to the left.

Despite the sudden turn, Graske was able to maintain his position behind the steering wheel. Van Hook, who was sitting on one of the midship seats,

managed to remain on the boat as well. Doyle, however, was thrown overboard. Accounts differ concerning where Doyle was located when he was ejected. According to Graske, Doyle was sitting on the inflatable tube, with his feet between the starboard midship and bow seats, and with at least one hand on a hand strap. According to Van Hook, Doyle was seated on the bow cushion (having moved there from the tube), and was not holding any hand strap. Doyle himself cannot remember.

Wherever he was sitting, Doyle was thrown into the water, and as the boat continued turning counterclockwise, it struck him in the back and on the head. Graske immediately put the boat in neutral. Doyle was some distance from the boat, injured but conscious. Graske brought the boat closer to Doyle, and Van Hook grabbed hold of him, eventually pulling him onto the inflatable tube.

Graske guided the boat to shore. From there, Doyle was transported to a local hospital and then transferred to medical facilities in the United States. Doctors diagnosed him with a flail chest, his respiration hindered by multiple rib fractures. Because of difficulties breathing, Doyle suffered permanent brain injury while hospitalized.

Doyle brought an action against Graske in Nebraska state court, claiming negligence in Graske's operation of the boat. Graske removed the case to federal district court, invoking admiralty jurisdiction under 28 U.S.C. § 1333(1). He sought to implead

several third-party defendants, including a mechanic who repaired and reassembled the boat's steering system just days before the accident. Graske, however, was unable to establish personal jurisdiction over the third-party defendants, and his claims were ultimately dismissed without prejudice. Doyle filed an amended complaint, adding his wife, Anne, as a plaintiff.

Following a bench trial, the district court entered judgment in favor of the Doyles. Applying general maritime law, the court found that Graske was negligent in his operation of the boat, and that Graske's negligence was a proximate and substantial cause of Doyle's injuries. It also determined that Doyle's own negligence contributed to his injuries, because he should have been more aware of the dangers around him. The court apportioned ninety percent of the fault for Doyle's injuries to Graske and potential tortfeasors, including the mechanic, and the remaining ten percent to Doyle himself. Taking account of Doyle's comparative negligence, the court awarded $3,238,153 in compensatory damages to Doyle. It also awarded $750,000 in damages for loss of consortium to Anne, but that amount did not reflect any proportional reduction for Doyle's comparative fault. Graske appeals.

II.

Graske first challenges the district court's finding that he was negligent in the operation of the boat.

Because negligence in admiralty is a factual determination, we may not set aside the district court's finding unless it is clearly erroneous. *McAllister v. United States,* 348 U.S. 19, 20 (1954). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Id.* (internal quotations omitted).

Under general maritime law, a boat owner owes a duty of reasonable care to passengers lawfully aboard his boat. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630 (1959). The district court found that Graske breached this duty by bringing the boat on plane while Doyle was seated in "a position of danger." The court acknowledged that according to Graske, Doyle was sitting on the tube when the accident occurred, whereas according to Van Hook, Doyle was sitting on the bow cushion. But the court determined that this difference of opinion was immaterial, because "both the tube and the bow cushion seat are positions of danger while accelerating a small watercraft on the open ocean." Given that Doyle was sitting at either one position or the other, the court reasoned that Graske should have known that it was unsafe to accelerate. Accordingly, the court concluded that by bringing the boat on plane, Graske

failed to exercise reasonable care for Doyle's safety, and was thus negligent in his operation of the boat.[1]

Graske does not dispute that his actions were negligent if Doyle was sitting on the tube. Indeed, various boating experts testified at trial that sitting on the tube was unsafe while the boat was planing, and there was no testimony to the contrary. Graske focuses instead on the district court's finding that his operation of the boat was negligent if Doyle was sitting on the bow cushion. Graske argues that this finding is clearly erroneous. We disagree.

At trial, Michael Sampsel, a mechanical and marine engineer, testified that the bow cushion was an unsafe position while the boat was on plane. Sampsel noted that the cushion was naturally subject to greater motion at higher speeds, given its location in the boat's bow. According to Sampsel, however, the cushion's design did not account for such increased motion. Quite the opposite, he explained, the cushion's short height – just 13.5 inches above the deck – meant that passengers would be sitting in an unusual posture, with their knees higher than normal. He also noted that the lack of thigh restraints or backrests meant that passengers would

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[1] Graske contends that the district court abused its discretion by failing to make a specific finding of fact as to where Doyle was sitting when the accident occurred. Because Doyle's exact seating position is not an ultimate fact necessary to reach a decision, we reject Graske's contention. *See Allied Van Lines, Inc. v. Small Bus. Admin.*, 667 F.2d 751, 753 (8th Cir. 1982).

be prone to sliding across the cushion. Sampsel acknowledged the presence of nearby hand straps, but maintained that they were meant for use in lifting the boat, not for use by passengers. In Sampsel's opinion, therefore, the bow cushion's location and design rendered the seat unsafe while the boat was on plane, and Graske violated safe boating practices if he proceeded to accelerate with Doyle sitting there.

The testimony of two other experts was not inconsistent with Sampsel's conclusion. Paul Larson, a marine surveyor and investigator, testified that when the boat was planing, a seat at midship was "a better and safer position" than one in the bow. He did not rule out the possibility that if Doyle was seated on the bow cushion when the accident occurred, then Graske's operation of the boat was negligent. According to Larson, whether Graske failed to exercise reasonable care would depend on the circumstances. Herbert Angell, a boating law administrator for the State of Nebraska, took a similar position. Like Larson, Angell testified that whether it was negligent to allow Doyle to sit on the bow cushion would depend on how fast the boat was traveling and other environmental conditions.

The only expert witness who stated categorically that sitting in the bow was safe at planing speed was Robert MacNeill, a boat manufacturing consultant. The district court noted, however, that MacNeill's expertise was in designing yachts, not small recreational vessels. The court therefore declined to credit MacNeill's testimony regarding the safe operation of

Graske's fourteen-foot boat. Giving due deference to the district court's determination of credibility, we cannot say that its refusal to accept MacNeill's testimony was unreasonable.

In light of the record as a whole, we conclude that substantial evidence supports the district court's conclusion that Graske breached a duty of reasonable care if Doyle was seated on the bow cushion when the boat came on plane. The definitive testimony of Sampsel, and the fact-dependent opinions of two other experts, provided sufficient basis for the court to find that the bow cushion was a position of danger under the circumstances, such that Graske should have known not to accelerate while Doyle was seated there. Given that the only other position where Doyle could have been located was on the tube – a position Graske does not dispute would have been unsafe – we hold that the district court's finding of negligence in Graske's operation of the boat is not clearly erroneous.

III.

Graske next challenges the district court's determination that his negligent operation of the boat was a proximate and substantial cause of Doyle's injuries. Issues of proximate causation in admiralty "involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). We may not disturb the district court's determination

unless it is clearly erroneous. *Am. Home Assurance Co. v. L & L Marine Serv., Inc.*, 875 F.2d 1351, 1354 (8th Cir. 1989).

Graske invokes the doctrine of superseding cause, arguing that the negligent repair of the boat's steering system superseded his negligent operation of the boat, thereby relieving him of liability for Doyle's injuries. The allegedly negligent repair of the boat, however, could not have been a superseding cause of Doyle's injuries. The doctrine of superseding cause applies "where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a *later* cause of independent origin that was not foreseeable." *Sofec*, 517 U.S. at 837 (emphasis added) (internal quotation omitted). Here, the allegedly negligent repair of the boat occurred *before* Graske's negligence, and thus could not have superseded it. Accordingly, the doctrine of superseding cause is of no avail to Graske.

Graske also invokes the doctrine of inevitable accident, arguing that Doyle's injuries would have occurred as a result of the failure of the boat's steering system, regardless of whether Graske's operation of the boat was negligent. We doubt that the doctrine of inevitable accident applies outside the context of collision liability, where it may be raised as an affirmative defense by vessels accused of causing collisions. *See The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 7-2, at 486-88 (2d ed. 1975).

But even assuming that the doctrine does apply in this general context, it would not apply in this case. An accident cannot be said to have been inevitable if it could have been prevented by "human skill and precaution, and a proper display of nautical skill." *The Louisiana*, 70 U.S. (3 Wall.) at 173. The district court did not clearly err in finding that Doyle's injuries could have been prevented if Graske had exercised reasonable care by waiting to accelerate until Doyle was seated at midship or the stern. After all, Graske and Van Hook were riding in those areas when the boat suddenly turned, and both were able to avoid harm. Doyle's injuries were therefore not the inevitable consequence of the malfunctioning of the boat's steering system. The district court's finding that Graske's negligence was a proximate and substantial cause of Doyle's injuries is not clearly erroneous.

IV.

Finally, Graske challenges the district court's award of loss-of-consortium damages to Doyle's wife, Anne. "Loss of consortium" refers to "loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations." *Black's Law Dictionary* 1031 (9th ed. 2009). In the context of marriage, the terms "loss of consortium" and "loss of society" are used interchangeably. *In re Midland Enters., Inc.*, 886 F.2d 812, 816 n.4 (6th Cir. 1989). Graske contends that general maritime law does not allow recovery for

loss of consortium by the spouse of a nonseafarer negligently injured beyond the territorial waters of the United States. A "nonseafarer" is someone, like Doyle, who is neither a seaman covered by the Jones Act, 46 U.S.C. § 30104, nor a longshore or harbor worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996). We review *de novo* the question whether general maritime law allows recovery for loss of consortium. *See In re Am. Milling Co.*, 409 F.3d 1005, 1013 (8th Cir. 2005).[2]

The Supreme Court's most recent guidance on how to approach this sort of problem came in *Atlantic Sounding Co. v. Townsend*, 129 S.Ct. 2561 (2009). There, the Court considered "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure." *Id.* at 2565. The Court began its analysis by reviewing the history of punitive damages under the common law generally and federal maritime law specifically. Based on that review, the Court determined that "punitive damages have long been available at common law," and that "the common-law tradition of punitive

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[2] The Doyles contend that Graske waived his argument that loss-of-consortium damages are unavailable under general maritime law by raising it for the first time in a post-verdict motion. In ruling on that motion, however, the district court considered and rejected Graske's argument on the merits. The issue is a purely legal one, and we proceed to consider it.

damages extends to maritime claims." *Id.* at 2569. The Court reasoned that because "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule," the only question remaining was whether the rule had been abrogated by Congress's enactment of the Jones Act, which provided seamen a statutory cause of action for negligence. *Id.* The Court concluded that the rule had survived the Jones Act, because the Act did not address either maintenance and cure or its remedy. *Id.* at 2572. Because Congress had not altered the traditional understanding regarding the availability of punitive damages in admiralty, the Court held that "such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law." *Id.* at 2575.

Applying the *Townsend* approach here, we conclude that there is no well-established admiralty rule, as there is with respect to punitive damages, authorizing loss-of-consortium damages as a general matter. In 1963, the question whether maritime law allowed recovery of loss-of-consortium damages by the wife of a longshoreman negligently injured in state territorial waters was "presented for the first time in a federal Court of Appeals." *Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257, 258 (2d Cir. 1963). In an opinion by Judge Friendly, the Second Circuit noted that common-law authorities regarding a wife's recovery for loss of consortium were "conflicting," *id.* at 265, and that there were no maritime

cases pertaining to the issue except for two district court decisions denying such recovery. *Id.* at 265-66. Against this backdrop, the court rejected the wife's loss-of-consortium claim. *Id.* at 267.

Loss-of-consortium damages were not definitively recognized under general maritime law in any context until 1974, when the Supreme Court held in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), that a wife could recover such damages for the wrongful death of her husband, a longshoreman killed in state territorial waters. Six years later, in *American Export Lines, Inc. v. Alvez,* 446 U.S. 274 (1980), the Court extended *Gaudet* to personal injury actions, holding that "general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." *Id.* at 276 (plurality opinion); *see id.* at 286 (Powell, J., concurring in judgment). The plurality in *Alvez* explained in its discussion of the Second Circuit decision in *Igneri* that although "the principles of maritime law prevalent in 1963 militated against, rather than supported, the creation of a right to recover for loss of society," *id.* at 280, *Gaudet* had since provided "the conclusive decisional recognition of a right to recover for loss of society that *Igneri* found lacking." *Id.* at 280-81.

The short history of loss-of-consortium damages in admiralty consists almost entirely of the Supreme Court's relatively recent decisions in *Gaudet* and *Alvez.* Given the narrow holdings of those decisions,

general maritime law on loss-of-consortium damages remains an area marked by few settled principles. Thus, unlike the Court in *Townsend*, which was not asked to "change maritime law in its operation as an admiralty court," we cannot simply apply a pre-existing general rule left unaltered by Congress. 129 S.Ct. at 2574 n.11.

The Court in *Alvez* recognized a right to recover loss-of-consortium damages for nonfatal injuries to a spouse in the territorial waters of the United States, but Doyle was injured nonfatally beyond such waters, off the coast of Grand Cayman Island. Whether someone in the position of Doyle's wife may recover loss-of-consortium damages is an open question in this circuit. Because we are confronted with an issue of first impression, we must continue the development of general maritime law "in the manner of a common law court." *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2619 (2008); *see Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959).

In exercising this authority, we heed the policy choices made by Congress. "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990). Where there is no recognized claim under general maritime law, as there was in *Townsend*, an admiralty court should look to legislative enactments governing closely related claims for policy guidance. *Id.* at 27. After reviewing the relevant policy pronouncements by Congress, we conclude that allowing

recovery for loss of consortium here would give rise to two serious disparities between general maritime law and legislative policies. These anomalies counsel against recognizing a right to recovery.

First, the spouses of those injured nonfatally beyond state territorial waters would be treated differently than the spouses of those injured fatally. Congress enacted the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 30301 *et seq.*, to provide a remedy in admiralty for wrongful deaths occurring more than three miles from the shore of the United States. *Id.* § 30302. Under DOHSA, a decedent's survivors may recover only for pecuniary loss; damages for loss of society are not available. *Id.* § 30303. The Supreme Court has held that DOHSA provides the exclusive measure of damages in wrongful-death actions arising beyond the three-mile limit. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978). Accordingly, the spouses of those injured fatally beyond that limit have no claim to loss-of-consortium damages. To allow recovery of such damages by the spouses of those injured *nonfatally* in the same waters would thus give rise to a significant anomaly. Indeed, the Court confronted just such a disparity in *Alvez*, and extended the holding of *Gaudet* to avoid it. Five Justices agreed that "there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society." *Alvez*, 446 U.S. at 281 (plurality opinion); *see id.* at 286 (Powell, J., concurring in judgment) ("Since I see no rational basis for drawing

a distinction between fatal and nonfatal injuries, I join in the judgment of the Court."). *Alvez* rejected a disparity between fatal and nonfatal injuries *within* territorial waters, and there is no reason to think that a disparity of that kind *beyond* such waters is more acceptable.

Second, if the spouses of injured nonseafarers like Doyle could recover loss-of-consortium damages on claims of negligence, then their rights under general maritime law would be greater than the rights of the spouses of injured seamen under the Jones Act. Although the Jones Act provides an action in negligence for injury to seamen, it does not authorize recovery by the seaman's spouse for loss of consortium. *See Miles,* 498 U.S. at 32. It would be odd if the relief available to the spouse of a nonseafarer were more expansive than that which Congress has afforded the spouse of a seaman. After all, the principles of maritime law have always included "a special solicitude for the welfare of seamen and their families." *Id.* at 36; *see also Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 387 (1970) (noting the development under maritime law of "a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages"). There is no reason to believe that Congress meant to place the spouses of injured seamen in a worse position than the spouses of injured nonseafarers. *Cf. Igneri,* 323 F.2d at 267 ("We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium

by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore.").

Given the value of uniformity recognized in *Miles,* 498 U.S. at 33, we agree with the Fifth and Ninth Circuits that general maritime law does not allow recovery of loss-of-consortium damages by the spouses of nonseafarers negligently injured beyond the territorial waters of the United States. *See Chan v. Soc'y Expeditions, Inc.,* 39 F.3d 1398, 1408 (9th Cir. 1994); *Nichols v. Petroleum Helicopters, Inc.,* 17 F.3d 119, 122-23 (5th Cir. 1994). It may be argued in reply that this holding creates an anomaly of its own. Under the rule we establish here, Anne Doyle may not recover loss-of-consortium damages, because her husband was negligently injured in waters beyond our nation's territorial sea. But under the rule set forth in *Alvez* (assuming that rule is not limited to the wives of harbor workers), she would have been able to recover for loss of consortium if the accident had occurred within territorial waters. This kind of disparity, however, already exists in maritime law: Loss-of-consortium damages are available under *Gaudet* when a wrongful death occurs in territorial waters, but not under *Higginbotham* and DOHSA when the death occurs on the "high seas." *See Higginbotham,* 436 U.S. at 624 & n.20. We therefore conclude that our holding best coincides with the congressional policies reflected in DOHSA and the Jones

Act, as well as the Supreme Court's development of general maritime law.

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For these reasons, the judgment of the district court is affirmed in part and reversed in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL DOYLE and ANNE DOYLE, Plaintiffs, v. LELAND GRASKE, Defendant.	8:05CV21 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Jun. 10, 2008)

This matter is before the court for resolution after a trial to the court from March 31, 2008 to April 8, 2008. This is an action in admiralty for damages for personal injuries in connection with a boating accident that occurred in Grand Cayman Island on October 31, 2003. Plaintiffs allege negligence by defendant Leland Graske in the operation of the boat. This is a trial to the court.

I. Findings of Fact

A. The Accident

The evidence adduced at trial establishes the following. The Doyle and Graske families are longtime friends. In October of 2003, Daniel Doyle and his wife, Anne, visited Graske and his wife, Leslie, at the Graske's condominium in the Cayman Islands.

Leland Graske owns a 14-foot Caribe inflatable boat for recreational purposes in the Cayman Islands. *See* Trial Exhibit ("Tr. Ex.") 1, replica drawing of a

Caribe 14-foot boat; Tr. Exs. 2-15, photographs of boat. The boat has seating for six people and is rated for a float capacity of six adults. Tr. Ex. 2-15, 205, photographs of boat; Tr. Ex. 18, Caribe owner's manual, and testimony of Leland Graske. In the boat, there is forward-facing seating for two aft, two midship, and rear-facing seating for two on a cushion in the bow. *Id.* The bow cushion seating is approximately four to five inches below the top of the inflated sides (gunnel) of the boat.[1] Tr. Ex. 221, photograph. The aft and midship seats are angled down from front to aft. Tr. Exs. 209, 211, photographs. The bow seat is flat. Tr. Ex. 221, photograph. All the seats measured from the top of the seat cushion are approximately 16" above the deck (the bow seat being 13.5"). Tr. Exs. 211, 216, photographs. The aft seat has a back rest. Tr. Ex. 219, photograph. The midship seat has a back rest for the starboard side only. Tr. Ex. 220, photograph. The bow seat has no back rest, but it does have a back stop of approximately 5 inches. Tr. Ex. 221, photograph. There are gunnel hand-hold straps (hand straps) for the midship and bow passengers. Tr. Exs. 206, 289, photographs. The boat was equipped with an outboard 70-horsepower two-cycle engine manufactured by Yamaha. Tr. Ex. 207. A 70-horsepower engine is the maximum horsepower engine approved for use on the craft. Tr. Ex. 18, Caribe owner's manual at 4.

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[1] A gunnel is the outer side or hull of the boat. In this case the tube is the gunnel. *See* Testimony of Herbert Angell.

The evidence adduced at trial shows that the boat had been repaired by a local mechanic employed by Kirk Marine a few days before the accident that is the subject of this action. Leland Graske testified that the steering mechanism had been frozen. In the repair, Kirk Marine reported that its mechanic had disassembled and lubricated the steering mechanism. The engine had been used for approximately two hours in the time between the repair and the accident. During those two hours the engine was used at idle or low rpms to travel close to shore.

Leland Graske testified that he has been a boat owner and operator for most of his adult life. Doyle had limited experience as a boat owner and operator. He owned a boat for use on the Missouri River for several seasons and he also owned a small fishing boat that he used infrequently. Graske also testified that he believes that Daniel Doyle is an above-average risk-taker. He would rate Doyle's risk-taking as 8 on a scale of 1-10, ten being the highest.

The testimony at trial establishes that on October 31, 2004, at approximately 10:30 a.m., Daniel Doyle, Leland Graske and Graske's friend, Robert (Bobby) Van Hook went fishing in Graske's Caribe inflatable boat. Graske testified that he swam to the boat's mooring and brought the boat back to shore, where Doyle and Van Hook boarded the boat with a cooler, a fishing tackle box, and fishing rods. No one was wearing a life jacket. There is considerable disagreement in the testimony with regard to the seating of the passengers in the boat.

Doyle testified that he has little or no recollection of the event. Leland Graske testified that he was driving the boat and was standing or sitting behind the midship starboard side steering panel, which rises above the boat's gunnel level and has a wind screen.[2] Graske testified that he recalls Van Hook sitting in the midship starboard side seat holding a diagonal hand strap located on the inside of the port inflatable tube. Graske consistently maintains that Daniel Doyle was seated on the starboard inflated tube, holding at least one hand strap and with his feet between the midship seat and the bow cushion seat. He testified that he does not believe Doyle changed position until he was ejected from the boat.

Bobby Van Hook testified that he was seated on the port side of the midship seat, the fishing equipment was on the starboard side and the tackle box and cooler were on the deck in front of the midship seat. He stated that the fishing rods were propped between the bow and the midship seating area, slanting upward toward the stern, on the starboard side. (Tr. Ex. 1). He testified that Graske was seated, not standing, behind the steering wheel. Van Hook also testified that he believes Doyle was initially seated on the port side inflated tube, toward the bow, adjacent to or above the bow seat. Van Hook testified that as the boat accelerated, Doyle moved to a fully-seated

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[2] Starboard is the right side of the boat when facing forward to the bow of the boat and port is the left side of the boat. *See* Testimony of Herbert Angell.

position in the bow seat on the port side of the seat. It was from this position that the plaintiff was ejected from the boat. He does not recall Doyle holding any hand straps.

Graske testified that after the occupants were on board, he steered the boat, at idle speed, through the no-wake zone. He testified that he announced to the passengers that the boat was about to accelerate by saying words to the effect "Here we go." He then increased speed to put the boat on plane.[3] The boat came on plane and, as the defendant was adjusting the trim, the steering linkage disengaged. The motor swung violently clockwise causing the boat to turn hard to the port side.

Doyle was ejected from the boat over the starboard side. The underside of the boat struck him on the right side of his back and the back of his head. Graske testified that he immediately put the boat in neutral or killed the motor. He and Van Hook located Doyle in the water. Graske was able to steer the boat by holding the engine's drag link in one hand and the throttle in the other. Doyle was hurt, but coherent. He apparently did not lose consciousness, nor was he bleeding. Graske and Van Hook brought Doyle back to shore. Once on shore, they helped him walk to the

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[3] "On plane" means that the boat is going fast enough that the hull of the boat is skimming along the top of the water rather than displacing the water. *See* Testimony of Herbert Angell.

edge of the beach. They called an ambulance which took him to the Cayman Islands Health Services Authority Hospital in Georgetown, Grand Cayman ("Georgetown Hospital").

B. The Medical Evidence

At Georgetown Hospital, the emergency room staff diagnosed Doyle with fractures of multiple right posterior ribs, a right flail chest,[4] a right hemothorax, a right pnuemothorax, right posterior chest surgical emphysema, and multiple minor lacerations to his posterior skull, right arm and right shoulder. *See* Tr. Ex. 37, Georgetown Hospital medical records at 1-2, 36. On admission, Doyle had no adverse neurologic signs or symptoms. *Id.* at 2, 36-37.

Doyle was treated with insertion of a chest tube and transferred to intensive care. *Id.* at 3-5. On the third day of his hospital stay, November 2, 2003, at 4:15 p.m., Georgetown hospital staff witnessed a cardiopulmonary arrest. *Id.* at 49. Cardiopulmonary resuscitation was initiated immediately and the code team arrived within five minutes. *Id.* Doyle was intubated and was placed on a ventilator by 4:30 P.M. *Id.* Thereafter, the plaintiff was sedated, medically paralyzed and kept on a ventilator. *Id.* at 27-29. On November 4, 2003, a chest x-ray showed bilateral changes consistent with acute respiratory distress

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[4] A flail chest describes a chest cavity in which the ribs do not provide enough rigid support for effective inspiration.

syndrome. *Id.* at 32-33. Later that day, Doyle was transported by air to the United States for treatment. *Id.* at 34-35. Originally, Doyle was to have been transferred directly to University of Nebraska Medical Center ("UNMC") in Omaha, Nebraska, but, because the respirator in the air ambulance was malfunctioning, Doyle was instead transported, along with Georgetown Hospital's ventilator, to Memorial Regional Hospital in Hollywood, Florida ("Hollywood Hospital"). *Id.* at 35; Tr. Ex. 38, Hollywood Hospital medical records.

Doyle was admitted in critical condition to the Hollywood Hospital at 2:37 a.m. on November 5, 2003. Tr. Ex. 38, Hollywood Hospital records at 60. On admission, his injuries were noted to be "a flail chest involving the right hemithorax with multi rib fractures, essentially involving the entire right hemithorax."[5] *Id.* at 24. He was diagnosed with fractures of all eleven right posterior ribs and his right scapula.[6]

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[5] A hemithorax is one side of the thorax, which is "[t]he upper part of the trunk between the neck and the abdomen; it is formed by the 12 thoracic vertebrae, the 12 pairs of ribs, the sternum, and the muscles and fasciae attached to these; below, it is separated from the abdomen by the diaphragm; it contains the chief organs of the circulatory and respiratory systems." Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 177000 & 408370).

[6] The scapula is "[a] large triangular flattened bone lying over the ribs, posteriorly on either side, articulating laterally with the clavicle at the acromioclavicular joint and the humerus at the glenohumeral joint. It forms a functional articulation with the chest wall, the scapulothoracic articulation." Stedman's

(Continued on following page)

Id. at 25-27. Diagnostic tests also showed underlying pleural effusion and a minimal anterior pnuemothorax.[7] *Id.* at 28. On November 7, a tracheostomy was performed to provide a permanent airway for his continued ventilation.[8] *Id.* at 3, 62. A gastrostomy feeding tube ("G-tube") was also surgically placed that day. *Id.* at 3. Doyle later developed respiratory insufficiency and was transported to UNMC on November 14, 2003. *Id.*

Doyle was admitted to UNMC at 9:46 p.m. on November 14, 2003. Tr. Ex. 39, UNMC records at 37. Doyle's attending physician at UNMC was Dr. Joseph C. Stothert, M.D., Ph.D., the Medical Director for Trauma at UNMC, a surgeon and a Ph.D. Pulmonary Physiologist. Tr. Ex. 79, Stothert curriculum vitae; Tr. Ex. 39, UNMC records at 6. He was discharged on November 19, 2003. Tr. Ex. 39, UNMC records at 38. It was noted in Doyle's discharge summary that he had been admitted on a ventilator, had a feeding tube

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Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 364860).

[7] A pleural effusion is increased fluid in the plural space. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 125240). The pleura is the serous membrane enveloping the lungs and lining the walls of the pleural cavity. *Id.* at 321290. A pnuemothorax is the presence of free air or gas in the pleural cavity. *Id.* at 323250. External compression of the lung by a pneumothorax or pleural effusion can lead to a pulmonary collapse. *Id.* at 85710.

[8] A tracheostomy is an operation to make an opening in the trachea. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 414210).

in place, and had suffered a closed head injury that left him confused and agitated at times. *Id.* at 37. During his hospitalization, Doyle was weaned from the ventilator and his condition improved to allow him to eat some regular food. *Id.* At the time of his discharge, he was able to speak well and to recognize family and friends. *Id.* Doyle received occupational and physical therapy consultations for ambulation, strength, and to learn how to perform the activities of daily living. *Id.* He was assessed for inpatient rehabilitation by a physical medicine and rehabilitation specialist, Dr. Jason Schave. *Id.* at 40. Dr. Schave diagnosed Doyle with anoxic encephalopathy with coordination difficulties and confusion, impaired activities of daily living and mobility, dysphagia,[9] and agitated behavior. *Id.* Doyle was referred to Methodist Hospital Acute Rehabilitation Center ("Methodist Acute Rehab") for inpatient rehabilitation. *Id.* at 37.

Doyle underwent a long course of physical and neurological rehabilitation. Tr. Ex. 40, Methodist Acute Rehab medical records at 14. He was hospitalized at Methodist Acute Rehab from November 19, 2003, to December 5, 2003, for medical care and occupational and physical therapy as part of a comprehensive brain injury rehabilitation program. *Id.* Doyle's treating physician there was Dr. Jude Cook, M.D., an internist and physical medicine and

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[9] Dysphagia is difficulty swallowing. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 122190).

rehabilitation specialist (also referred to as a physiatrist). *Id.* at 10; Tr. Ex. 107, Cook curriculum vitae.

At the time of his admission, Doyle had right rib fractures, a right clavicle fracture, a right scapular fracture, a G-tube placed, a tracheostomy, he was agitated and had symptoms of dysphagia. Tr. Ex. 104, Trial Deposition of Jude Cook, M.D. ("Cook Dep.") at 33. Dr. Cook diagnosed traumatic brain injury and anoxic encephalopathy.[10] *Id.* at 34. A neurological examination revealed a brain injury rated level IV on the Rancho Los Amigos scale, a scale that helps medical professionals determine a person's level of impairment secondary to brain injury.[11] *Id.* at 6. A person with a Rancho level IV brain injury demonstrates poor memory, insight and judgment, lack of awareness of his physical ailments and environment and agitation. *Id.* at 11. Dr. Cook did not diagnose Doyle with depression, but testified that people in a Rancho level IV of brain injury often lack the awareness of their environment or personal health that would lead them to be depressed. *Id.* at 11. Dr. Cook also found that Doyle's cerebellar functioning, which relates to fine motor control and coordination, was

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[10] Encephalopathy is any disorder of the brain. Stedman's Medical Dictionary (27th ed. 1994) (available on Westlaw at Stedmans 129640). Anoxia is absence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues. *Id.* at 24700.

[11] *See also* Rancho Los Amigos National Rehabilitation Center website ("Rancho Los Amigos website"), http//www.rancho.org/patient_education/cognitive_levels.pdf

slow but intact. *Id.* at 13. Dr. Cook established goals of brain injury recovery, education of the patient and his family regarding brain injury issues, improving Doyle's mobility to a standby assist level, improving his activities of daily living and his swallowing to an ultimate goal of removal of his tracheostomy. *Id.* at 14-15.

During the term of the hospitalization, Doyle's rib fractures resolved, his ability to swallow improved, and his tracheostomy was removed. Tr. Ex. 40, Methodist Acute Rehab medical records at 14. Dr. Cook's discharge summary notes that during the hospitalization Doyle's cognition slowly improved from a Rancho level IV to a near Rancho level VI at the time of his discharge.[12] *Id.* Significantly however, Doyle still had a gastronomy tube, mild agitation and reactive depression secondary to his head injury. *Id.* at 13.

Doyle was followed on an outpatient basis by Dr. Cook. Tr. Ex. 104, Cook Dep. at 25. In May 2004, Dr. Cook reported slow improvement. *Id.* Cook examined Doyle again in November 2004, and noted that test results were consistent with a moderate to severe

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[12] Rancho level VI is labeled "Confused-Appropriate." At that level, "a patient shows goal-directed behavior, but relies on cueing for direction. He can relearn old skills such as activities of daily living, but memory problems interfere with new learning. He has a beginning awareness of self and others." *See* Rancho Los Amigos website, http//www.rancho.org/research_pted.htm

brain injury. Cook Dep. at 29. When Doyle was last seen by Dr. Cook in May 2006, he was neurologically the same as he had been in the previous examination, but continued to be depressed. *Id.* at 42. Based on Dr. Cook's examination of Daniel Doyle, Doyle's history and Dr. Cook's collaborative consultations with other physicians and health providers, Dr. Cook testified that he believed to a reasonable degree of medical certainty that Daniel Doyle is permanently disabled and unemployable. *Id.* at 30-31.

After his release from Methodist Acute Rehab, Doyle was referred to Dr. Richard L. Bowles, Psy.D., a rehabilitation neuropsychologist, for testing to determine the extent of impairment from the brain injury. *Id.* at 18-19; Tr. Ex. 42, Neuropsychological Evaluation dated March 1, 2004 ("Bowles first report") at 1; Tr. Ex. 67, Deposition of Richard L. Bowles, Psy.D., ("Bowles Dep.") at 5. Dr. Bowles diagnosed dementia secondary to acquired brain injury and depressive reaction by history. Tr. Exs. 42, Bowles first report at 7; 104, Cook Dep. at 19; Bowles Dep. at 38. Dr. Bowles reported considerable impairment in numerous cognitive areas including attention/concentration, processing speed, memory and executive functioning and problem solving. Tr. Ex. 104, Cook Dep. at 23; Tr. Ex. 42, Bowles first report at 6. Test results indicated a moderately severe degree of overall impairment. Tr. Ex. 42, Bowles 2004 Report at 7. Bowles recommended 24-hour supervision. *Id.* At the time of the first exam, Dr. Bowles expected Doyle to recover further over the following several months to a

year. *Id.* Dr. Bowles reexamined Doyle in July 2004. Tr. Ex. 43, Neuropsychological Evaluation dated March 1, 2004 ("Bowles second report") at 2. The second neuropsychological examination showed a moderate to severe brain injury. *Id.* at 6. Test results were generally consistent with those obtained in the earlier testing, but there were significant declines in some areas. *Id.* at 4, 6. Doyle continued to exhibit deficits in short term memory, basic and complex attention as well as decreased vigilance and slowed processing of information. *Id.* at 6. Given Doyle's relative lack of progress, Dr. Bowles was concerned about the prognosis for recovery of cognitive function. *Id.*

Doyle's last neuropsychological evaluation was performed by Dr. Bowles in 2005. Tr. Ex. 44, Neuropsychological Evaluation dated June 23, 2005 ("Bowles third report") at 2. Doyle's scores on various tests reflected little change from his 2004 testing. *Id.* at 7. Dr. Bowles found Doyle's status to be incompatible with the ability to operate a motor vehicle safely. *Id.* Dr. Bowles testified by deposition that Doyle's physical condition is at its maximum improvement. Tr. Ex. 67, Bowles Dep. at 50-52. Dr. Bowles stated that Doyle's psychological condition may be improved with different therapies, but it too is static. *Id.*

At present, the record shows that, although he is within the average range of global intellectual functioning, Doyle has deficits in verbal and visual short-term memory, concentration and complex attention, processing word speed and categorical fluency as well

as diminished motor speed and coordination in both hands. Tr. Ex. 44, Bowles third report at 7. He has little motivation, questionable judgment and lacks awareness of safety. *Id.* Doyle continues to need ongoing supervision as a result of the questionable reliability of his judgment and his lack of awareness of safety-related issues. *Id.* His signs and symptoms are consistent with a moderate to severe brain injury. *Id.* Dr. Bowles also stated that Doyle's status was not compatible with the ability to operate a motor vehicle safely. *Id.* Dr. Bowles reports that he expects Doyle's cognitive status to remain stable into the future, barring a stroke or other brain injury. *Id.* at 7.

On his treating physician's recommendation, Doyle received outpatient therapeutic services from Quality Living, Inc., in Omaha from 8/2004 to 3/2005. Quality Living records show that he did not make much progress there with the therapy. Tr. Ex. 41, Quality Living, Inc.'s medical records at 21. Other records show that Doyle's cognitive level improved from a Rancho level IV (confused and agitated) to a level VI (confused and appropriate). Tr. Ex. 46, Giiter records at 7; *see* also Rancho Los Amigos website, http//www.rancho.org/patient_education/cognitive_levels.pdf.[13]

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[13] Rancho level VII is theoretically the highest level a thinking-impaired patient can achieve short of full recovery. *See* Rancho Los Amigos website, http//www/rancho.org.

At the present time, Doyle is being treated by his family physician, an internist, Dr. Michael F. Giiter. Tr. Ex. 46, Giiter medical records. Dr. Giiter's notes indicate that Doyle has diagnoses of reactive depression and decreased mental status secondary to brain injury. *Id.* at 49. Doyle is also being treated by a psychiatrist, Dr. Rodney L. Nitcher, D.O., Tr. Ex. 45, Nitcher medical records. Dr. Nitcher has expressed the opinion that Doyle's psychiatric condition is chronic and that Doyle needs 24-hour supervision and cannot live alone. Tr. Ex. 288, Allison questionnaires at 3; Tr. Ex. 24, Allison Supplemental Life Care Plan at 2.

All of Doyle's treating physicians agree that he is permanently and totally disabled. Dr. Cook testified to his opinion that Doyle suffered a traumatic brain injury from his boating accident as well as an anoxic encephalopathy due to subsequent events. Tr. Ex. 104, Cook Dep. at 35. All of the doctors agree that his condition relates to an injury sustained as a result of the boating accident described above. *See* Tr. Ex. 78, Report of Dr. Joseph C. Stothert at 1 (noting "the original injury on October 31, 2003 caused a deterioration in Mr. Doyle's respiratory status leading to an anoxic event" and "the injury to his chest and subsequent events caused the brain injury that Mr. Doyle currently suffers from"). The physicians further agree that it is unlikely Doyle sustained the closed head injury at the time of accident, but is more likely that he had an anoxic hypoxic event during his hospital treatment for the injuries he sustained during the

boating accident.[14] Tr. Ex. 104, Cook Dep. at 34. No doctor is of the opinion that the anoxic hypoxic event is unrelated to the boating accident.

C. Duty of Care

At trial, the plaintiffs presented the testimony of Herbert Charles Angell, Nebraska State Boating Law Administrator, with respect to the duty or standard of care for the operator of a boat. *See also* Tr. Ex. 58, Herbert Angell curriculum vitae. Angell testified that he has investigated more than a thousand boating accidents. He reviewed several boating safety publications. *See* Tr. Ex. 89, United States Coast Guard ("USCG") inland rules for navigation; Tr. Ex. 92, 2007 Nebraska boating guide. He stated that his review of the evidence in this case led him to conclude that Doyle had been seated on the top of the tube, or gunnel, on the starboard side toward the bow. He testified that, in his opinion, Graske should not have allowed Doyle to sit on the starboard right gunnel or tube and that to have done so violated safe boating practices. He testified that even if Doyle had been seated in the bow seating area at the front of the boat, facing backward, Graske's operation of the boat

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[14] Anoxia is absence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues. It is to be differentiated from hypoxia, which is a decrease below normal levels of oxygen in inspired gases, arterial blood, or tissue, short of anoxia. Stedman's Medical Dictionary (27th ed. 2000) at [on Westlaw] Stedmans 24700 & 196860

would have been unsafe and "negligent." He testified, assuming that Van Hook's version of events were true, that Doyle was at first seated on the tube, but sometime in the period of time between the boat's proceeding at no-wake speed and coming up on plane, Doyle assumed a position on the bow seat and was told by both Van Hook and Graske to hold on, but did not do so, it would have been an unsafe boating practice for Graske to proceed. Angell also testified that at planing speed the only safe seating for anyone other than the operator would be in the middle seat facing forward. He stated that the distance between the cushioned area and the top of the tube would not provide an adequate backrest to allow safe seating in the bow cushion seating area.

Michael Sampsel, a mechanical and marine engineer, also testified as an expert witness on behalf of the plaintiffs. He testified that based on the evidence he had reviewed, the hull planing speed of a boat similar to Graske's is estimated to be less than 30 MPH. He further testified that the cushion on the bow of the boat – on which Van Hook claims Daniel Doyle was seated – is not designed to be a seat when the boat is "underway," or going faster than a fast idle.

Paul J. Larson, a marine accident investigator, marine surveyor, consultant and retired Commander in the USCG, testified that he also investigated the accident. Tr. Ex. 54, Larson curriculum vitae. He reviewed the deposition testimony in this case as well as various boating safety regulations, guides and

statistics. *See* Tr. Ex. 87, USCG requirements for recreational boats; Tr. Ex. 88, USCG boating statistics; Tr. Ex. 93, California Boating Law; Tr. Ex. 94, Federal Safety Tips. Based on his knowledge and investigation of this and numerous other "fall overboard" type accidents, he testified that, in his opinion, it was "negligent" for Graske to have allowed Doyle to sit on the tube of the boat. He testified that the operator of a boat is responsible for all aspects of safe operation of the vessel. In his opinion, a sudden mechanical failure caused the accident, but the unsafe boating by Graske in allowing Doyle to remain seated on the tube while the boat was underway was the cause of Doyle's fall overboard. Also, he testified that a shipowner has a nondelegable duty to maintain a ship in a seaworthy condition. Larson also testified that if a passenger were sitting on the tube of the boat, holding the hand straps would not have prevented ejection from the boat. He further testified that, even if the testimony of Bobby Van Hook were credited and Doyle moved from the tube to the bow cushion seat after the vessel was underway and was warned to hold a hand strap, but did not, Graske's operation of the boat would have been in violation of safe boating practices. Larson also stated that the bow cushion area would not have been a safe seat while the boat was underway at planing speeds.

The defendant's expert, Robert MacNeill, a naval architect, human factors engineer and Coast Guard Licensed Captain, also testified at the trial. Tr. Ex. 261, Robert MacNeill curriculum vitae. He testified

that he has investigated or reviewed investigations of hundreds of boating accidents in connection with consulting provided to the Coast Guard with respect to the implementation of the federal boat safety act. He further stated that in preparation for testimony in this case he physically inspected and operated Leland Graske's inflatable boat. Tr. Ex. 202-227, photographs of boat, Tr. Ex. 260, Supplemental Report of Robert MacNeill (received for limited purpose of measurements). He testified that, in his opinion, there are occasions when it would be safe to allow a passenger to sit on the tube of an inflatable boat. With respect to a duty of pre-trip inspection by a boat operator, he stated that it would be sufficient for the operator to make sure that the boat was operational. He also testified that, in his opinion, any passenger who was seated in the front of the boat and was not holding on to a hand strap would have been thrown out of the boat in a sudden turn. He also testified that he knew of no rules, regulations, or standards that would require a boat operator to insist that a passenger hold a handhold.

D. Damages

Daniel Doyle's wife, Anne, and his children also testified at the trial. They testified with respect to Doyle's abilities and disabilities and to differences in his personality since the accident. Anne Doyle also testified to the differences to her life and to the Doyles' marriage since the accident.

The parties have stipulated that the Doyles have incurred medical bills to date in the amount of $252,517. Filing No. 295, Ex. A, Stipulation, Tr. Ex. 22, Summary of Medical Bills. The evidence shows that prior to the accident, Daniel Doyle was employed as a mechanical engineer earning between $52,692 and $57,301 per year for the years 1999 to 2002. Tr. Exs. 81-85, Income Tax Returns, 1999-2003. He would have been expected to continue working until he reached age 66, his Social Security full retirement age. Tr. Ex. 255, John Scarborough Supplemental Economic Loss Analysis at 2. There is no evidence that he would have been inclined to retire any earlier.

Both parties submitted evidence on the cost of providing medical and supportive care to Doyle in the future. According to life expectancy tables, Doyle would be expected to live to age 79. Tr. Ex. 80, Standard Ordinary Mortality Table; Tr. Ex. 25, Report of Kent Jayne at 8. The plaintiffs' expert, Kathie Allison, a certified life care planner, presented three alternative life care plan scenarios. Tr. Ex. 23, Allison Life Care Plan; Tr. Ex. 24, Supplement to Life Care Plan. Option I would provide additional assistance for Doyle to remain in his home, such as help with home maintenance and cleaning, as well as a household attendant for 111.6 hours per week, and would cost $66,811 to $67,051 annually, in today's dollars. Tr. Ex. 23 at 10; 24 at 4. Option II would provide for live-in care for Doyle and would cost between $102,500 and $109,500 annually, at the rate for care of $280 to $300 per day. *Id.* Option III would provide supportive

living at a facility designed for brain-injured people, such as Quality Living, Inc., and would cost $82,125 annually. *Id.* Under each option, Ms. Allison's life care plan would also include additional sums for physicians' visits, medication and supplies, physical and occupational therapy, equipment, and mileage, at an approximate cost of between $2,434 and $3,049 per year. *Id.* at 4. Ms. Allison estimates the lifetime cost for Doyle's care under Option I would be $1,830,876 to $1,866,462; under Option II would be $2,765,834 to $2,978,611; and under Option III would be $2,232,140 to $2,261,386 in today's dollars. *Id.*

William H. Burke, Ph.D., a certified rehabilitation counselor and Board-certified disability analyst and rehabilitation consultant, testified on behalf of the defendant. Tr. Ex. 258, William Burke, Ph.D. curriculum vitae. He stated that he had reviewed Doyle's medical records, physicians' recommendations, Ms. Allison's life care plan and the depositions and testimony in this case. He concluded that Daniel Doyle has a combination of cognitive and higher cognitive deficits that interfere with his ability to live independently. He agreed that Doyle needs someone available for round-the-clock care. He also presented several options for Doyle's continued care. Tr. Ex. 257. Each included costs for medical care, equipment and medication.

Dr. Burke's first option for Doyle's supportive care is based on the assumption that Mrs. Doyle would continue to care for Daniel Doyle in his home and that she preferred to do so. *Id.* at 13. Dr. Burke

testified that this option contemplates the utilization of a community living coach for 40 hours per week to enable Doyle to perform work-type activities in the community. Dr. Burke estimated that the community living coach services could be provided for $23,712 per year. *Id.* at 15.

Option II assumes that Mrs. Doyle would not be available and would provide Doyle with a live-in personal care attendant and homemaker along with household production assistance and case management to replace those services provided by his wife. *Id.* Dr. Burke estimated that the services of a live-in personal care attendant could be obtained for approximately $50,219 per year, including room and board. *Id.* at 16.

Option III provides for placement of Doyle in an assisted-living facility. Dr. Burke estimated that this option would cost between $28,416 and $49,320 per year. Dr. Burke's calculations do not include any compensation for Mrs. Doyle or other family members in caring for Doyle. Dr. Burke testified that he envisioned the assisted-living option to be utilized when Doyle was elderly.

The plaintiffs' economic expert witness, Kent Jayne, M.A., M.B.A., a vocational Economic Consultant and Rehabilitation economics specialist, calculated the value of Doyle's lost earnings as of July 2007 to be $152,826. *See* Tr. Ex. 25, Report of Kent Jayne at 8; Tr. Ex. 61, Kent Jayne curriculum vitae. He calculated that the present value of Doyle's

diminished earning capacity from July 1, 2007 to his retirement age of 66 is $817,112. *Id.* The defendant's economic expert, John Scarbrough, Ph.D., calculated Doyle's lost future wages according to a worklife expectancy of 12.6 years from the age of 49, to account for the likelihood that Doyle would not live to the age of 66, or would have been out of the workforce at times. Tr. Ex. 255, Scarbrough Supplemental Report at 4. He also factored the projected cost of health insurance and retirement benefits into his future earnings analysis and also calculated the present value of Doyle's lost earnings before and after a deduction of Doyle's Social Security disability benefits. *Id.* Dr. Scarbrough's analysis resulted in a total net economic loss for past and future wages in the amount of $886,696 (present value), if disability payments were deducted, and of $1,059,785, without the deduction of disability payments.

Dr. Scarbrough also analyzed the future cost of medical care and supported living for Doyle and calculated present value under both Ms. Allison's Life Care Plan and the plan proposed by Dr. Burke. Tr. Ex. 255, Scarbrough Supplemental Report at 4. According to Dr. Scarbrough's analysis, the present value of the future costs of Doyle's care under Ms. Allison's Option I (household attendant) would be $1,580,750. *Id.* at 21, Table A.2 for Option I. The present value of the future costs of Doyle's care under Ms. Allison's Option II (live in care) would be $2,449,476. *Id.* at 22, Table A.2 for Option II. The present value of the future costs of Doyle's care under

Ms. Allison's Option III (supported living) would be $1,919,934. *Id.* at 23, Table A.2 for Option III. Under the scenarios presented by defendant's expert, Dr. Burke, the present value of the future costs of Doyle's care under Option I (wife available) would be $656,762. *Id.* at 30, Table A.4 for Option I. The present value of the future costs of Doyle's care under Option II (wife not available – home care) would be $1,285,272. *Id.* at 31, Table A.4 for Option II. The present value of the future costs of Doyle's care under Option III (wife not available – facility care) would be $930,691. *Id.* at 32, Table A.4 for Option III.

II. Conclusions of Law

A. Law

This action arises under the admiralty and maritime jurisdiction of this court pursuant to 28 U.S.C. § 1333. General maritime law governs a tort claim when conditions of location and connection to maritime activity are satisfied. *Sisson v. Ruby,* 497 U.S. 358, 369 (1990). The general tort concepts of negligence and proximate cause apply in admiralty and maritime cases. *Phillips Petroleum Co. v. Stokes Oil Co.,* 863 F.2d 1250, 1255 (6th Cir. 1988). In tort actions, courts look to the Restatement (Second) of Torts as a source of general common law principles to determine general maritime law. *See Wells v. Liddy,* 186 F.3d 505, 525 (4th Cir. 1999); *Wallis v. Princess Cruises, Inc.,* 306 F.3d 827, 841 (9th Cir. 2002).

In order to succeed on a claim of negligence under maritime law, a plaintiff must establish all elements of a negligence cause of action in admiralty, which are essentially the same as land-based negligence under the common law: 1) the existence of a duty of care owed by the defendant to the plaintiff; 2) the breach of that duty of care; 3) a causal connection between the offending conduct and the resulting injury, which is called "proximate cause"; and 4) actual loss, injury or damage suffered by the plaintiff. *Pearce v. United States,* 261 F.3d 643, 647-48 (6th Cir. 2001); *Hartley v. St. Paul Fire & Marine Ins. Co.,* 118 Fed. Appx. 914, 919 (6th Cir. 2004). The duty of care can be derived from "duly enacted laws, regulations, and rules; . . . custom . . . or . . . the dictates of reasonableness and prudence." *Galentine v. Estate of Stekervetz,* 273 F. Supp. 2d 538, 544 (D. Del. 2003).

As a general rule, a shipowner owes to a person lawfully aboard the vessel "the duty of exercising ordinary care, which is held to mean reasonable care under the circumstances of each case." *Urian v. Milstead,* 473 F.2d 948, 951 (8th Cir. 1973); *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959). Under that standard, the degree of care required must be in proportion to the apparent risk. *Muratore v. M/S Scotia Prince,* 845 F.2d 347, 353 (1st Cir. 1988). In other words, under certain situations, reasonable care may be a very high degree of care and in another situation it may be less. *Smith v. Southern Gulf Marine Co. No. 2, Inc.,* 791 F.2d 416, 421 (5th Cir. 1986). The "extent to which the circumstances

surrounding maritime travel are different from those encountered in daily life and involve more danger to a passenger, will determine how high a degree of care is reasonable in each case." *Mendelson v. Delaware River & Bay Authority,* 112 F. Supp. 2d 386 (D. Del. 2000).

Admiralty law also adheres to principles of comparative fault. *United States v. Reliable Transfer Co.,* 421 U.S. 397, 409 (1975); *McDermott, Inc. v. AmClyde,* 511 U.S. 202, 221 (1994). Accordingly, proportional division of liability applies in admiralty cases. *See, e.g., Phillips Petroleum Co. v. Stokes Oil Co., Inc.,* 863 F.2d 1250, 1255 (6th Cir. 1988) ("Damages in admiralty cases are generally allocated among tortfeasors based on comparative fault."). Under the maritime rule, the plaintiff's comparative negligence mitigates his damages. *Carey v. Bahama Cruise Lines,* 864 F.2d 201, 208 (1st Cir. 1988).

Admiralty law imposes joint and several liability on tortfeasors. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 273 n.30 (1979) (stating that "the general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury"). Where joint and several liability is imposed, "[n]ormally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor." *Id.; see also McDermott, Inc. v. AmClyde,* 511 U.S. at 210 n.10 (noting that comparative negligence and joint and several liability are not incompatible). Joint and several liability allows a

plaintiff to recover from one of multiple defendants, when plaintiff's recovery from other tortfeasors is limited by outside facts, such as a defendant's insolvency, making other defendants, rather than the innocent plaintiff, responsible for the shortfall. *McDermott,* 511 U.S. at 210 n.10. Although the damages assignable to the plaintiff's own culpability must be subtracted from whatever damages the plaintiff has proven at trial, the defendant would still be liable "in full for the remainder," even where a third-party's negligence contributed to the injuries. *See Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. at 260.

Joint and several liability applies "where there has been a judgment against multiple defendants," whereas, in admiralty law, a defendant may be liable for the proportion of fault assignable to another culpable party who was not named as a defendant. *See Id. (quoting McDermott, Inc. v. AmClyde,* 511 U.S. at 221).

B. Analysis

1. Duty/Breach of Duty

In making these findings the court generally credits the testimony of Doyle's treating physicians and plaintiffs' experts Angell, Larson, Sampsel, and Allison. The court also generally agrees with the opinions of the defendant's life care expert Burke. The court generally agrees with both expert economists Jayne and Scarbrough. For reasons discussed

below, the court is not inclined to fully credit the testimony of defendant's expert MacNeill.

The court finds that the evidence establishes that a boat owner and operator has an undisputed responsibility for the passengers' safety and the safe operation of the boat. The court credits the testimony of Angell and Dr. Larson, supported by the boating safety regulations and guidelines admitted into evidence, that it is an unsafe boating practice to operate a vessel with a passenger seated on the gunnel or tube of the boat. The court finds that defendant Graske's conduct in the operation of the boat violated a boat operator's duty to use reasonable care under the circumstances. Significantly, the circumstances in this case involve a small boat outside the no wake zone in the ocean accelerating to bring the boat on plane.

The court finds that the totality of the evidence shows that Doyle was seated on the tube as the boat proceeded through the no wake zone. It is plausible that Doyle may have moved to the bow seating area as the boat accelerated, but whether he did so or not does not affect the court's analysis. The court finds that Graske did not use reasonable care for the safety of his passengers under the circumstances in either event. The evidence establishes that both the tube and the bow cushion seat are positions of danger while accelerating a small watercraft on the open ocean. Similarly, whether or not Doyle was told by either Graske or Van Hook to "hold on," and disregarded the admonition, makes no difference to the

court's analysis. If Doyle had disregarded such a command, it would have then been negligent for Graske to continue to accelerate knowing that Doyle was not holding the hand straps.

Graske had a duty of reasonable care under the circumstances for the safety of his passengers and the safe operation of his boat. The evidence shows that it is an unsafe boating practice to accelerate up to plane with a passenger in a position of danger. Under these circumstances, a boat operator using reasonable care would ensure that his passengers were seated in a safe position in the boat while accelerating. Graske, an experience boater, knew or should have known that his passenger was in a place of danger as long as Doyle was in the bow section of the boat and the boat was traveling at a speed sufficient to bring it on plane.

Daniel Doyle, as a passenger somewhat familiar with boating, also had a duty to use reasonable care for his own safety. The evidence shows that Daniel Doyle put himself in a place of danger and knew or should have known that it was an unsafe boating practice to sit on the tube of the boat. He similarly should have known that it was not safe to change positions in the boat while the boat was accelerating.

Nevertheless, if Doyle were sitting on the tube, Graske's duty of reasonable care for passenger safety would have correspondingly increased in proportion to the increased danger to the passenger. Thus, Graske would have an even higher duty to a passenger

sitting on the inflatable tube portion of the boat while the boat is operating at plane speeds. Any criticism that can be leveled at Daniel Doyle for either sitting on the tube or failing to hold a strap, can also be leveled at Graske for accelerating in the face of such conduct. If Doyle's conduct on the boat was unsafe, then it would be unsafe for boat's operator to continue to allow the conduct and to operate the boat in a fashion that jeopardizes the passenger's safety.

Although Mr. MacNeill's measurements are valuable to the court's analysis, the court is not inclined to credit his testimony on safety issues. Mr. MacNeill's essential expertise is in designing yachts, not small recreational boats shorter than twenty feet. MacNeill is also imbued with the laissez-faire safety attitude of most manufacturers. Although he repeatedly recognized the boat operator's duty to safely operate the boat, he was quick to point out the passenger's responsibility to act safely, failing to appreciate that contributory negligence is not a complete defense under admiralty law. Significantly, MacNeill also admitted that anyone seated in the bow of the boat who was not holding the hand straps would have been ejected if there were a sudden turn. The court credits Mr. Larson's opinion that a passenger holding the hand straps would not be able to react quickly enough to prevent his ejection from the boat. Mr. Van Hook testified that he was surprised at how quickly the plaintiff was ejected from the boat. Were it not for his position at, or aft of, the boat's pivot point, it is likely Van Hook would have suffered the same fate.

The plaintiffs' assertion that the defendant should have inspected the steering linkage to the engine prior to operating the boat is not supported by the credible evidence. The plaintiffs' expert witnesses' expressed opinion that an inspection of the steering linkage at the engine would have been a safe thing to do is irrefutable. However, there is no evidence to support the court's imposition of a duty on a boat operator to examine this linkage before each excursion. The safety and regulatory materials received by the court support a duty only to make sure the steering is operational. On Graske's boat, operating the steering wheel prior to starting the excursion fulfills that requirement. There is no evidence that the steering mechanism was not functional prior to the instant catastrophic failure. The boat was operated from its mooring to shore and then from shore through the no wake zone and then some distance further. It is reasonable to assume the steering mechanism was operational until the drag arm became disengaged from the steering cable extension. That event occurred while the engine was being trimmed. Trimming the engine requires tilting it to gain effective propeller purchase with the water in order to maintain plane and efficient operation.

Because the above analysis is dispositive, the court need not address the plaintiffs' other allegations of negligence.[15]

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[15] The plaintiffs' claims that Graske was negligent in failing to maintain a seaworthy vessel, failing to require a life jacket,

(Continued on following page)

The evidence adduced in this case also establishes that other parties also owed duties to the plaintiff. The manufacturer of the boat would have had a duty to warn a purchaser, operator, or occupant of the boat that bow seating would not be safe at planing speeds or that seating on the inflatable tubes should not be allowed during operation at planing speeds. Accordingly, it appears that the manufacturer may have some liability for failure to warn that no one should be in the bow section of the boat or on the inflatable tubes when the boat operated at a speed sufficient to keep it on plane. Similarly, the mechanic who repaired the steering mechanism had a duty to repair it properly. The evidence establishes that a reasonably competent mechanic would have known that a used nylock nut should have been replaced with a new nylock nut and not reinstalled. The mechanic's employer had a duty to properly supervise the mechanic's work and to ensure that new nylock nuts were installed when replacing such nuts during repairs, especially on critical mechanisms such as steering. The medical providers involved in Doyle's care all had a duty to provide standard medical care. There is no evidence in this case, however, that the care provided by any of the health care providers was substandard. Although Dr. Stothert expressed the opinion that he would have placed Doyle on a

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and failing to keep the boat in safe operating condition were dismissed a the close of plaintiffs' case-in-chief for the reasons stated on the record.

ventilator at the outset of his hospitalization, there is no evidence that any failure to do so violated the standard of care of a reasonable medical professional. Stothert testified that he did not have sufficient records to come to such a conclusion. The extent to which these duties were breached by other parties cannot be determined by the court since the court does not have jurisdiction over them.

2. Causation

There is no sole proximate cause in this case. The issue of an intervening, superseding cause has already been addressed in the court's earlier order. *See* Filing No. 276. The evidence at trial shows that an unbroken chain of events connects the boat accident to Doyle's anoxic brain injury. Substandard medical care generally does not break the chain of causation even if the care adds to the damages.[16] Throughout Doyle's hospital care in the Cayman Islands, at the time of his air ambulance transfer, and in the Florida hospitalization, Doyle had oxygenation problems. He would not have had this condition were it not for suffering from a flail chest caused by the fracture of all his posterior ribs in the boating accident.

The evidence shows that the accident would not have occurred absent the failure of the boat's steering mechanism, which was allegedly due to the

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[16] It is questionable that medical negligence is even cognizable in the Grand Cayman Islands.

mechanic's negligence. A sudden mechanical failure, however, is not an unforeseeable event. It is the duty of an owner and operator of a vessel to operate the boat safely in the event of such an occurrence. Assuring that passengers are properly seated in a small boat accelerating on the open ocean is fundamental to that duty. The failure of Graske to exercise reasonable care under the circumstances in the operation of his boat by accelerating while a passenger was in a position of peril caused Doyle to fall overboard in the sudden turn.

As to the defendant's assertion that the failed steering mechanism is the sole cause of the accident, the court notes that even the defendant recognized that an emergency turn is necessary when swimmers suddenly appear from beneath the water. No doubt the defendant will concede that any number of hazards that require a hard turn can occur. In that event the bow passenger will be ejected from the boat. Thus, every boating manual received by the court in this case notes the requirement that passengers should not sit on the side of the boat while it is underway. Accordingly, the court finds that the negligence of defendant Graske in the operation of the boat was a proximate and substantial cause of Daniel Doyle's injuries.

The court must next determine whether the plaintiff's own negligence also contributed to the injury and the proportionate share of the damages attributable to the plaintiff vis-a-vis defendant Graske. Given the size and power of this boat, even

plaintiffs' expert expressed the opinion that anyone in the bow of this boat would be ejected in a sharp turn, and that anyone in the boat would be able to appreciate the danger of not holding on to the hand straps when the boat was at planing speed. The evidence shows that Doyle knew or should have known that it was unsafe to sit on the gunnel or tube of the boat while it was underway. Doyle violated a passenger's duty to use reasonable care for his own safety.

Doyle's comparative negligence mitigates the damages attributable to Graske to some extent. However, the court finds that, because, as the operator of the boat, Graske has a higher duty of care than his passenger, Graske remains responsible for a substantial portion of the damages.

Because there are no other party defendants to this action, the court cannot determine the extent to which the alleged negligence of other tortfeasors contributed to the Doyle's injuries, nor can it determine the proportion of the damages that should be allocated to each of those parties. Given the totality of negligence supported by the record in this case, the court finds that the plaintiff Daniel Doyle can be held accountable for no more than 10% of the total liability. The evidence indicates that the greatest share of the responsibility for the negligence in this case rests with the boat mechanic and his employer for improperly repairing the steering mechanism and for reusing a nylock nut. There may also be a claim against the manufacturer for failing to warn of the dangers to bow and gunnel riding passengers of this

14-foot boat. However, these later mentioned parties are not part of the case presented to this court and subject to its jurisdiction. Consequently, the court will leave it to the courts that do have jurisdiction over these matters to sort out any contribution or indemnification issues between the defendant and the aforementioned potential tortfeasors. Accordingly, with respect to the overall liability of all potential tortfeasors for the injuries Doyle sustained in the boating accident, the court apportions damages as follows: 10% to the plaintiff, Daniel Doyle, 90% to the defendant, Leland Graske, and the other potential tortfeasors. Plaintiff Daniel Doyle's recovery should accordingly be reduced by 10%.

3. Damages

The parties have stipulated that plaintiff Daniel Doyle incurred medical bills in the amount of $252,517. The court credits the testimony of Dr. Scarborough that Daniel Doyle's lost wages up to November 1, 2007, amount to $269,112. The evidence shows that, had he not been injured, Doyle would have worked until his full retirement age, or to age 66. The court further finds that the present value of Doyle's future lost wages until retirement is $790,646, resulting in damages for past and future lost wages in the amount of $1,059,758.

The court finds that Doyle will incur certain medical expenses in the future as a result of his injuries. The court finds, however, that there is no

reasonable likelihood that physical or occupational therapy for Doyle would be effective or necessary in the future. The evidence supports a one-time award of $400 for equipment such as a cane, shower grab bars, and a shower bench.

The evidence also shows that Doyle will need round-the-clock care by a personal attendant for the rest of his life or until he may need care in a residential facility as part of his normal aging process. The option for the supportive care of a live-in caregiver would best suit Daniel Doyle's needs and conditions. The evidence shows that Doyle needs round-the-clock care. The court credits Dr. Burke's testimony that such care, furnished by a personal care assistant, along with case management, room and board, transportation, and allowances for the costs of housecleaning, home maintenance, physician's care, and medication could be obtained for approximately $58,907 per year in today's dollars, resulting in the present value of total damages for Doyle's future medical and supportive care in the amount of $1,285,272.

Provision of the cost of live-in care will adequately account for the services of plaintiff's wife for any part she continues to play in Daniel Doyle's care. Mrs. Doyle's willingness to care for her husband is commendable, but she is not required to do so. If Anne Doyle were not available to care for Daniel Doyle, the services of a personal care attendant would be required. Accordingly, Mrs. Doyle's services should be calculated at the same rate as a personal care

attendant. If Daniel Doyle should need to be admitted to an assisted-living or long-term care as he ages, he will have been compensated for his lost wages and can pay for assisted living the same as any other individual, but will have the balance of the damage award to pay for any additional supportive care that he will reasonably require as a result of his injuries. In view of the foregoing, the court finds that a special damages award of $2,597,947 to plaintiff Daniel Doyle will adequately compensate him for the injuries he has suffered in this case. This award includes his past and future lost wages, medical expenses – past and future – and the cost of his future supportive care.

The evidence also supports a substantial award of compensatory damages to Daniel Doyle for pain and suffering and loss of enjoyment of life and to Anne Doyle for loss of consortium. Testimony at trial shows that both Daniel and Anne Doyle have suffered an incalculable loss. Daniel Doyle has substantial physical and mental disabilities. The evidence shows that Daniel Doyle has enough awareness of his condition to appreciate his predicament. His injuries have left him depressed, lacking in motivation, and incapable of exercising proper judgment. He comprehends the fact that he is no longer the person he once was, but is powerless to change his situation.

As a result of Daniel Doyle's injury, Anne Doyle has essentially lost the companionship of the person she once knew. The course of her life, as well as

Daniel Doyle's, was irreversibly altered by the accident. She has become a full-time caregiver for a person who is no longer the person she married. The court finds that she should be compensated for this intangible loss at a level close to that of her husband. Accordingly, the court finds that a general damages award for pain, suffering and loss of life's enjoyment in the amount of $1,000,000 is appropriate for Daniel Doyle and a general damages award of $750,000 is appropriate for Anne Doyle's loss of consortium.

Because the court finds comparative negligence by Daniel Doyle that operates to mitigate defendant Graske's liability, Daniel Doyle's total award of $3,597,947 must be reduced by 10%, or $359,794, resulting in a total damages award of $3,238,153 to Daniel Doyle. Anne Doyle's damages are not subject to any reduction. Accordingly, in conformity with this opinion, a judgment in the amount of $3,238,153 will be entered in favor of plaintiff Daniel Doyle, and a judgment in the amount of $750,000 will be entered in favor of plaintiff Anne Doyle and against defendant Leland Graske, together with taxable court costs.

DATED this 10th day of June, 2008.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL DOYLE and ANNE DOYLE, Plaintiffs, v. LELAND GRASKE, Defendant.	)	8:05CV21 MEMORANDUM AND ORDER (Filed Aug. 11, 2008)

This matter is before the court on the defendant's motion to amend findings of fact and conclusions of law and judgment, or for a new trial, *Filing No. 325,* and on defendant's motion to stay execution of the judgment, *Filing No. 327.* This action for damages for personal injuries as the result of a boating accident was tried to the court under admiralty jurisdiction from March 31, 2008, to April 8, 2008. The court found the defendant liable for the plaintiffs' injuries and awarded damages to the plaintiff Daniel Doyle in the amount of $3,238,153.00 and to plaintiff Ann Doyle for loss of consortium in the amount of $750,000.00.

I. Motion to Alter or Amend

In his motion to alter or amend the findings, the defendant contends that damages for loss of consortium are not recoverable in admiralty and that, if such damages are awarded, the award should be reduced by the percentage of fault assigned to the

injured spouse. The defendant did not raise this issue at any earlier point in this litigation, which has been pending since January 18, 2005.[1] Plaintiff Ann Doyle's loss-of-consortium claim was added in an amended complaint filed on October 11, 2007. *Filing No. 171.* The defendant consented to the filing. *See Filing No. 169.* Graske never moved to dismiss the amended complaint, nor did he assert in his answer that Mrs. Doyle's claim was precluded as a matter of law. *See Filing No. 177.* In the pretrial order, the parties agreed that Mrs. Doyle's recovery of general damages, including loss of consortium, was a controverted and unresolved issue. *Filing No. 254,* Order on Pretrial Conference at 4. At trial, the plaintiffs presented evidence in support of Ann Doyle's loss-of-consortium claim without objection by defendant. The defendant never argued at trial that recovery for loss of consortium was not available in admiralty. At this late stage of the proceeding, the court is reluctant to entertain the issue. If the court were to consider the issue, however, the court would find that the defendant's position is not tenable.

It is settled that general maritime law imposes duties to avoid unseaworthiness and negligence and that fatal and nonfatal injuries caused by the breach of either duty are compensable. *Norfolk Shipbuilding & Drydock Corp. v. Garris,* 532 U.S. 811, 813-14

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[1] Defendant contends that he raised the issue by denying liability for Ann Doyle's loss-of-consortium claim. The court does not agree.

(2001); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408-09 (1970) (recognizing a wrongful-death remedy under general maritime law that supplements federal statutory remedies). General maritime law provides a cause of action for the loss of a deceased or injured spouse's "society" or consortium. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 276 (1980) (involving nonfatal injuries); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (outlining elements of recovery for wrongful death in state territorial waters, guided by state wrongful death statutes and the "humane and liberal" policies inherent in maritime law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978) (allowing recovery of loss-of-consortium damages for injuries in territorial waters); *see also Exxon Shipping Co. v. Baker*, ___ U.S. ___, ___, 128 S. Ct. 2605, 2630 n.21, 2008 WL 2511219, **19 n.21 (June 25, 2008) (affirming continuing validity of Alvez and citing it for the proposition that maritime law provides a cause of action for loss of consortium).

Congress has enacted statutes that also provide remedies for certain maritime injuries or deaths. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990); *see, e.g.*, the Jones Act, 46 U.S.C. § 30104 *et seq.* (covering seamen in the course of employment);[2] the

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[2] "Seaman" is a term of art that has an established meaning under maritime law, incorporated in the Jones Act. *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 487 (2005). A seaman under the Jones Act is a maritime worker with a substantial employment-

(Continued on following page)

Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 30301 *et seq.* (covering persons killed on the high seas);[3] and the Longshore and Harbor Workers Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* (covering nonseaman maritime workers injured or killed in the course of employment). These statutes provide only for pecuniary relief. *See Miles,* 498 U.S. at 32.

When a statute resolves a particular issue, the general maritime law must comply with that resolution. *Garris,* 532 U.S. at 817; *Scarborough v. Clemco,* 391 F.3d 660 (5th Cir. 2004). Because loss-of-consortium damages are not available under these statutes, there can be no recovery for loss of consortium under general maritime law for an injury or death that is also covered by one of the statutes. *See Miles,* 498 U.S. at 32; *Mobil Oil Corp. v. Higginbotham,* 436 U.S. at 623 (noting that when a Congressional act "speak[s] directly to a question, courts are not free to 'supplement' Congress' answer

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related connection to a vessel in navigation. *Chandris, Inc. v. Latsis,* 515 U.S. 347, 373 (1995).

[3] DOHSA provides that "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." 46 U.S.C. § 30301. DOHSA does not cover deaths resulting from incidents occurring within state territorial waters – that is, deaths resulting from incidents occurring within three miles of the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States. *See Moragne,* 398 U.S. at 395.

so thoroughly that the Act becomes meaningless."). Thus, if a factual scenario is covered by a statute such as the Jones Act or DOHSA, "and the statute directs and delimits the recovery available under the statute," the statute will operate to limit the recovery available under the general maritime law as well. *Scarborough v. Clemco Indus.*, 391 F.3d at 667.

Nevertheless, unless Congress has prescribed a comprehensive tort recovery scheme for a class of maritime actions, admiralty remedies can be supplemented by those available under state law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210-211 (1996) (noting that Congress had passed no law prescribing remedies for the wrongful deaths of nonseafarers in territorial waters). Traditionally, state remedies have applied in maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker or person otherwise engaged in the maritime trade. *Id.* at 207. State remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action. *Id.* at 215-216. In *Yamaha*, the Supreme Court noted that the provision of a maritime cause of action for wrongful death "centered on extension of relief, not on the contraction of remedies," basing its decision on the longstanding maritime precept that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *Id.* at 213 (*quoting*

The Sea Gull, 21 F. Cas. 909, 910 (C.C.Md.1865) (No. 12,578).

Although an admiralty court should look primarily to legislative enactments for policy guidance, it "may not slough off [its] responsibilities for common law remedies because Congress has not made a first move." *Exxon Shipping Co. v. Baker,* ___ U.S. at ___, 128 S. Ct. at 2630 (exercising federal maritime common law authority to review punitive damages award under general maritime law). The propriety of damages under general maritime law falls within a federal court's jurisdiction to decide, "subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." *Id.* at 128 S. Ct. 2619 (involving an award of punitive damages).

None of the federal maritime statutes that would potentially limit Ann Doyle's recovery for loss of consortium apply in this case because Daniel Doyle was neither a seaman nor a maritime worker, and his injuries were not fatal so as to come within the purview of DOHSA. Accordingly, the court finds that Ann Doyle's recovery is not precluded and the defendant's motion to alter or amend the judgment will be denied.

To the extent that the plaintiff's remedies under general maritime law could be expanded or supplemented by state or foreign law, the court would be faced with a determination of which law should determine the proper measure of compensatory damages. In an admiralty action, federal choice of law

principles apply. *See Lauritzen v. Larsen,* 345 U.S. 571, 577 (1953). Neither party has addressed this issue. Courts weigh seven factors in rendering choice-of-law decisions: place of the wrongful act, law of the flag, allegiance or domicile of the injured, allegiance of the defendant shipowner, place of contract, inaccessibility of a foreign forum, and the law of the forum. *See id.* at 583-91. Application of these factors would not seem to favor the law of the Cayman Islands, and, in any event, the defendant has not shown that Mrs. Doyle's loss-of-consortium damages would be unavailable under Cayman Islands law or any international law principles. In view of the circumstances, the court finds an award of loss-of-consortium damages under general maritime law is appropriate.

The defendant's contention that the loss-of-consortium damages award should be proportionately reduced also lacks merit. The proportional-liability rule applies only to defendants who proximate cause an injury. *Exxon Co., U.S.A. v. Sofec, Inc.,* 517 U.S. 830, 842 (1996). "A party whose fault did not proximately cause an injury is not liable at all." *Id.*

II. Motion to Stay Execution of the Judgment

Defendant Graske moves to stay execution of the judgment pending resolution of post-trial motions and pending appeal. The motion for a stay pending resolution of post-trial motions will be rendered moot by this decision. In lieu of a supersedeas bond,

defendant proposes an irrevocable letter of credit. *Filing No. 329,* Ex. A. In response, without conceding the adequacy of the letter of credit, plaintiffs contend that any letter of credit or supersedeas bond should include The Law Offices of Ronald J. Palagi, in light of the attorney lien filed in the case, and also contend that the effective date of the letter of credit should be June 10, 2008, the date of judgment. *Filing No. 330.*

Under the Federal Rules, a party is entitled to a stay as a matter of right if a supersedeas bond is posted. Fed. R. Civ. P. 62(d). Alternatively, the party may move for the court to exercise its discretion to waive the bond requirement. *Dillon v. City of Chicago,* 866 F.2d 902, 904 (7th Cir. 1988). "When determining whether to waive the posting of bond, the district court considers several criteria: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position." *Id.* Also, the district court has discretion to order a partially secured or unsecured stay if the judgment creditor's interest in ultimate recovery is not unduly endangered. *Fed. Prescription Serv., Inc. v. American Pharm. Ass'n.,* 636 F.2d 755, 760-61 (D.C. Cir. 1980).

The court is satisfied that the letter of credit from Omaha National Bank will adequately protect the plaintiffs' interest and secure the judgment. The court agrees that the Law Offices of Ronald J. Paliagi should also be protected in the letter of credit. Accordingly,

IT IS ORDERED that:

1. Defendant's motion to alter or amend the judgment is denied.

2. Defendants motion for a stay of the judgment pending appeal is granted.

3. Within ten days of the date of this order, defendant shall file an irrevocable letter of credit drawn in favor of Plaintiffs Daniel Doyle and Ann Doyle and the Law Offices of Ronald J. Palagi, effective as of the date of judgment.

4. Upon the filing of such letter of credit, execution on the judgment shall be stayed until the time for filing an appeal has expired or the appeal, if filed, is resolved.

DATED this 11th day of August, 2008.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3144

Daniel Doyle and Anne Doyle,

Appellees

v.

Leland Graske,

Appellant

v.

Jason R. Haynes, et al.,

Appeal from District of Nebraska – Omaha
(8:05-cv-00021-JFB)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Bye and Judge Shepherd would grant the petition for rehearing en banc filed by appellee Anne Doyle.

October 22, 2009

Order Entered at the Direction
of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

No. 09-857

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

ANNE DOYLE,

Petitioner,

v.

LELAND GRASKE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should review the Eighth Circuit Court of Appeals' application of *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) in rendering an opinion consistent with the only two circuits having squarely addressed the issue of whether general maritime law affords loss of consortium damages for a nonseafarer injured beyond United States territorial waters. Contained within this analysis are the following:

1. Whether the policies underlying the congressional enactments upon which the Court relied in *Higgenbotham* and *Miles* are applicable to a claim for loss of consortium damages for injuries to a nonseafarer injured beyond the territorial waters of the United States.

2. Whether a state's interest which may allow application of state law remedies in territorial waters can extend to non-territorial waters of the United States where individual states have no interest.

3. Whether a defendant waives a defense which addresses a purely legal issue when the trial court and the circuit court both address the issue on its merits.

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1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-16 (4th ed. 2004) 14

BASIS FOR JURISDICTION

Respondent questions federal subject matter jurisdiction under admiralty law for the reason that this incident occurred approximately 300 yards from the shore of the Grand Cayman Island, within the inland waters of that nation. *See Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971) (stating that "maritime law governs only those torts occurring on the navigable waters of the United States."). Respondent agrees with the chronology that Petitioner set forth in her Petition.

STATEMENT OF THE CASE

This case involves the purely legal question of whether general maritime law recognizes a loss of consortium cause of action for the wife of a non-seafarer[1] who is injured on foreign coastal waters.

Dan Doyle was injured when he fell out of a boat operated by the Respondent approximately 300 yards from the shore of the Grand Cayman Island. His wife, Anne Doyle, sought recovery for loss of consortium. The Eighth Circuit Court of Appeals reversed the

[1] "A 'nonseafarer' is someone . . . who is neither a seaman covered by the Jones Act, 46 U.S.C. § 30104, nor a longshore or harbor worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq. See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996)." *Doyle v. Graske*, 579 F.3d 898, 905 (8th Cir. 2009).

judgment in favor of Anne Doyle, determining that general maritime law did not provide such a remedy for the spouse of a nonseafarer who was injured beyond the territorial waters of the United States.

REASONS FOR DENYING THE PETITION

I. No Split Exists Among The Decisions Of The Circuit Courts

The Court has addressed the availability of loss of consortium damages under general maritime law in four cases. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (recognizing a loss of consortium remedy arising from the death of a longshoreman killed in territorial waters); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (limiting *Gaudet* by refusing to recognize an action for loss of consortium in high seas wrongful death actions); *American Export Lines v. Alvez*, 446 U.S. 274 (1980) (extending *Gaudet* to a harbor worker injured in territorial waters); and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (explicitly limiting *Gaudet* to actions involving longshoremen in territorial waters). Taken together, these cases demonstrate that loss of consortium is available only in limited circumstances – where injury or death occurs to longshoremen/harbor workers in United States territorial waters. The situs of the injury and the status of the injured person are critical factors. Since *Gaudet*, *Alvez*, and *Miles* were decided, two circuits have addressed whether the spouse of a

nonseafarer who is injured beyond territorial waters has a claim for loss of consortium. *See Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) and *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994). Both determined that general maritime law bars such damages. Because no court of appeals has published any opinion to the contrary, the circuits are not divided on the issue raised in the petition for certiorari.

A. Only The Fifth And Ninth Circuits Have Addressed The Availability Of Loss Of Consortium Damages For The Spouse Of A Nonseafarer Injured Beyond United States Territorial Waters And Their Opinions Are Consistent

The Fifth and Ninth Circuits have squarely addressed whether loss of consortium damages are available to the spouse of a nonseafarer who is injured beyond the territorial waters of the United States. *See Chan v. Soc'y Expeditions, Inc.*, and *Nichols v. Petroleum Helicopters, Inc.*

In *Chan,* the petitioners were on a raft headed toward a coral atoll in French Polynesia when the raft overturned. The husband sustained physical injury and suit was brought for the physical injuries as well as loss of consortium.

Addressing the consortium issue, the Ninth Circuit said that it would "look for guidance to congressional enactments in the field of maritime law,

Supreme Court decisions, and relevant state legislation." *Id.* at 1407 (citing *Miles,* 498 U.S. at 27-28).

The court began its analysis by surveying several statutory and common-law remedial schemes applicable in admiralty actions: Death on the High Seas Act, 46 U.S.C. § 30302 *et seq.* ("DOHSA"), the Jones Act, 46 U.S.C. § 30104 *et seq.*, and *Sea-Land Services, Inc. v. Gaudet. Chan* at 1407. It noted, however, that none applied, because the husband had not died, was not a seaman, and had not been injured in state territorial waters.

Still, the court found DOHSA instructive. Observing that DOHSA limits recovery in high seas to pecuniary losses, the Ninth Circuit held that in the case of an injury occurring beyond state waters, "loss of consortium and society damages are not available . . . under general maritime law." *Id.* at 1407-08. "This conclusion," said the court, "serves the goal of uniformity in remedies in maritime cases that the Supreme Court emphasized in *Miles*." *Id.* at 1408. In reaching its decision, the court emphasized that to allow consortium claims for injuries on the high seas, but not for death on the high seas, "would effectively reward a tortfeasor for killing, rather than merely injuring his victim." *Id.*

Nichols, 17 F.3d 119, involved injury to a longshoreman who was injured beyond the territorial waters of the United States. Although the injury was to a longshoreman, the Fifth Circuit determined that maritime claims for loss of consortium can succeed

only where the plaintiff establishes both of the *Gaudet* criteria identified in *Miles*. *Nichols* at 123. Those two criteria are (1) the involvement of a longshoreman and (2) an injury in territorial waters. *Miles* at 31. Thus, the Ninth Circuit held that where a longshoreman's "injuries occurred outside territorial waters," his spouse's loss of consortium claim would fail because she could not "satisfy one of the two equally important requirements of *Gaudet* and *Alvez* as limited by *Miles*." *Nichols* at 123.

Since the only circuits that have addressed the availability of loss of consortium damages for a spouse injured beyond the United States territorial waters are the Fifth and the Ninth Circuits, and because those circuits are consistent with each other, no need exists for this Court to address the issue based upon a conflict among the circuits.

B. Neither The First, Second Nor Third Circuit Has Addressed The Availability Of Loss Of Consortium Damages For The Spouse Of A Nonseafarer Injured Beyond United States Territorial Waters

Anne Doyle claims that the First, Second and Third Circuits have allowed loss of consortium damages for plaintiffs in her position. She is mistaken. None of the cases on which Petitioner relies evidences a circuit split on whether consortium damages are available in admiralty when a non-fatal injury occurs beyond United States waters.

From the First Circuit, Petitioner cites *Lyon v. Ranger III,* 858 F.2d 22 (1st Cir. 1988). This case involved a death that occurred in United States territorial waters. The court did not address whether loss of consortium damages would be recoverable for a non-fatal injury beyond the United States territorial waters. In fact, the only discussion regarding loss of consortium damages is contained in the last sentence of the opinion which states: "In regard to the second matter [loss of consortium], we find the closeness of the Lyon family to be amply supported by record evidence." *Id.* at 30. Petitioner also refers to the First Circuit's decision in *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). That case concerned the availability of punitive damages, not loss of consortium. The court determined that an analogy between consortium damages and punitive damages could not be made in admiralty.

From the Second Circuit, Petitioner cites *Zicherman v. Korean Airlines Co. Ltd.*, 43 F.3d 18 (2d Cir. 1994) *aff'd in part, rev'd in part,* 516 U.S. 217 (1996). The issue in *Zicherman* was whether, under the Warsaw Convention, non-pecuniary damages were available for a death occurring on the high seas. In its decision, the court asserted that general maritime law permits recovery for loss of consortium, but it did so in the context of interpreting and applying the Warsaw Convention, which provides an exclusive cause of action when injuries occur on international flights. Purporting to apply "general maritime principles," the court concluded that "the Warsaw

Convention permits recovery for loss of society." *Id.* at 21 (citing *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 828-29 (2d Cir. 1994)). But this Court reversed the Second Circuit's decision and ruled the plaintiffs could not recover for loss of consortium because the deaths occurred on the high seas and DOHSA bars recovery of consortium damages. *See* 516 U.S. at 229-30. Petitioner also cites two unreported court cases, *Saunders v. Cunard Line, Ltd.*, 1995 WL 329323 (S.D.N.Y. 1995) and *Wartman v. Commodore Cruise Line*, 100 F.3d 943, 1996 WL 47964 (2d Cir. 1996). *Saunders* is a district court case that involved an injury that occurred in United States territorial waters. It did not address whether loss of consortium damages would be available beyond these territorial waters. In *Wartman*, the court did not discuss the differences between injuries in territorial waters and those beyond territorial waters. Rather, it summarily stated "under federal maritime law dependents may recover damages for loss of society . . . " Given the fact that this is an unreported decision devoid of any analysis, it cannot be interpreted for the broad proposition which Petitioner claims.

All three cases from the Third Circuit that Petitioner cites dealt with injury or death that occurred in United States territorial waters. *See New York & Long Branch Steamboat Co. v. Johnson*, 195 F. 740 (3d Cir. 1912), *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986) and *Calhoun v. Yamaha Motor Corp., USA*, 40

F.3d 622 (3d Cir. 1994). *DeLoach* addressed a consortium claim by the child of a longshoreman injured in territorial waters. Petitioner states: "In that opinion it is clear that a spousal claim for consortium is cognizable under maritime law." (Petitioner's Brief, p. 8). Had the petitioner in *DeLoach* been the spouse of the injured longshoreman, then under *American Export Lines, Inc. v. Alvez*, recovery for loss of consortium would have been allowed. It would be the classic case of an injury to a longshoreman in territorial waters that *Alvez* specifically decided. The *DeLoach* court did not apply loss of consortium to a nonseaman who sustained an injury beyond United States territorial waters. In *Yamaha Motor Corp, USA*, the question addressed was whether a state remedy could be applied to an injury that occurred in United States territorial waters.

Neither the First, Second nor Third Circuits have analyzed whether loss of consortium damages are available to a nonseafarer spouse injured beyond United States territorial waters. Therefore, there is no circuit split for this Court to resolve.

II. General Maritime Law Does Not Provide A Remedy For Loss Of Consortium Arising From Injury To A Nonseafarer Beyond United States Territorial Waters

Both DOHSA, which provides a statutory cause of action for death on the high seas, and the Jones Act, which provides a statutory right of action to

injured seamen, limit recovery to pecuniary damages. In other words, these statutes bar recovery of non-pecuniary damages, such as loss of consortium. While neither statute governs this case, they each provide guidance to the Court in determining what remedies are available under general maritime law. "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles." *Miles*, 498 U.S. at 24. Indeed, the policies underlying federal legislation were the Court's guiding light in *Miles*:

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Id. at 27.

In *Miles*, a mother sought loss of consortium damages arising out of the death of her son when he was stabbed to death by a fellow crew member within the territorial waters of the United States. *Id.* at 19. In determining that a loss of consortium remedy did

not exist, the Court examined the principles underlying DOHSA, even though the death occurred in territorial waters. *Id.* at 24. The Court noted that DOHSA was a "manifestation of congressional intent 'to achieve uniformity in the exercise of admiralty jurisdiction.'" *Id.* at 26, *quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The Court concluded that "Congress has spoken directly to the question of recoverable damages on the high seas, and 'when it does speak directly to a question, the courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless.'" *Id.* at 31, *quoting Higginbotham*, 436 U.S. at 625.

Applying this uniformity principle to the present facts, there is no rational basis to allow loss of consortium damages for non-fatal injuries arising beyond the territorial waters of the United States. As aptly pointed out by the Eighth Circuit, to allow such damages would create at least two anomalies: (1) spouses of non-fatally injured persons could recover loss of consortium damages, but spouses of fatally injured persons could not; and (2) spouses of injured seamen covered under the Jones Act could not recover loss of consortium damages, but spouses of nonseamen could. "It would be odd if the relief available to the spouse of a nonseafarer were more expansive than that which Congress has afforded the spouse of a seaman. After all, the principles of maritime law have always included 'a special solicitude for the welfare of seaman and their families.'" *Doyle v. Graske,* 579 F.3d 898, 907 (8th Cir. 2009), *quoting*

Miles, 498 U.S. at 36. *See also Alvez*, 446 U.S. at 281, extending *Gaudet* to non-fatal injuries in territorial waters because "[t]here is no apparent reason to differentiate between fatal and non-fatal injuries in authorizing the recovery of damages for loss of society." Petitioner asks this Court to grant certiorari for the purpose of creating such anomalies. But, as the Eighth Circuit rightly concluded, policy and precedent augur against doing so.

Atlantic Sounding Co., Inc. v. Townsend, 129 S.Ct. 2561 (2009), does not support the proposition that due to the lack of federal legislation, loss of consortium is available in this case (Petition p. 11). In *Townsend*, this Court analyzed the steps it took in *Miles* to reach its decision that loss of consortium was unavailable for the death of a seaman in territorial waters. It stated:

> The Court in *Miles* first concluded that the "unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes" authorizing maritime wrongful-death actions, supported the recognition of a general maritime action for wrongful death of a seaman. *Id.*, at 24, 111 S.Ct. 317 (discussing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), which overruled *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886)). Congress had chosen to limit, however, the damages available for wrongful-death actions under the Jones Act and DOHSA, such that damages were not

> statutorily available for loss of society or lost future earnings. See *Miles,* 498 U.S., at 21, 31-32, 111 S.Ct. 317. The Court thus concluded that Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law, *id.,* at 32-36, 111 S.Ct. 317.

Id. at 2752. The *Townsend* Court concluded that "[t]he reasoning of *Miles* remains sound." *Id.* It was the application of that reasoning with which the *Townsend* Court disagreed because *Townsend* involved the availability of punitive damages in a maintenance and cure action. *Id.* The Jones Act did not address punitive damages, so the allowance of such a remedy did not violate the congressional intent underlying the Act. *Id.* DOHSA, on the other hand, specifically limited recovery to "pecuniary" damages, so it was appropriate to apply that policy limitation to the plaintiff in *Miles* who was seeking non-pecuniary damages for her husband's death in territorial waters.

The rationale of *Miles* is equally applicable in the present case. Petitioner's husband was injured in non-territorial waters. Just as the policy reasons underlying DOHSA apply to death in territorial waters, they also apply to injuries on the high seas. Federal maritime law does not provide Petitioner with a remedy.

III. State Law Remedies Are Available Only In Territorial Waters

Petitioner is not entitled to a state law remedy that is foreclosed by federal law. Petitioner relies heavily upon the Third Circuit decision in *Calhoun v. Yamaha Motor Corp., U.S.A.*, but fails to recognize that *Yamaha* involved an incident that occurred in state territorial waters. The references in *Yamaha* to state-court remedies almost always include the limiting caveat that such remedies may apply in cases arising in territorial waters. The court said, for example:

- "extending state wrongful death statutes to fatal accidents in **territorial waters** was compatible with substantive maritime policies";
- "state survival statutes may be applied in cases arising out of accidents in **territorial waters**";
- "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their **territorial waters**"; and
- "we preserve the application of state statutes to deaths within **territorial waters**."

Id. at 624, 628, 628 n.13 (emphasis added). At no point in its written decision did the court assert that a state's statutes, remedies, or interests in regulating activity extend beyond territorial waters.

Yamaha, therefore, does not support the proposition that a plaintiff may pursue a state-law remedy for lost consortium in a cause of action arising from injury that occurs beyond United States waters. The law is, in fact, to the contrary. As Professor Schoenbaum has explained, "[T]he state of the law at the present time seems to be that **loss of society/consortium is not available under the general maritime law**, but may be recovered under the *Yamaha* doctrine for deaths and injuries in state waters." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-16 (4th ed. 2004) (emphasis added). The remaining cases cited by Petitioner also involve state supplementation in actions arising on territorial waters, and are, therefore, inapposite.

Petitioner is mistaken when she says that "applying Nebraska's remedy for loss of consortium would do nothing to undermine admiralty law." One of the driving forces for the Court's development of federal admiralty law is uniformity. *See Miles*, 498 U.S. at 27, 33. To allow state supplementation of federal admiralty law beyond the territorial waters of that state would destroy the uniformity which the Court seeks to maintain. Discussing the recognition of a state damage remedy for a death that occurred on the high seas, the Court explained:

> [T]he questionable practical significance of this difference in recovery, see *Mobil Oil Corp. v. Higginbotham, supra,* 436 U.S. at 624, and n. 20, 98 S.Ct., at 2014, and n. 20 is far overshadowed by the potential for serious

> conflicts between DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses. We defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary.

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986). State law remedies have no application outside territorial waters.

IV. Graske Did Not Waive His Objection To Anne Doyle's Claim

Whether a party has waived an argument by raising it for the first time on a Motion for Reconsideration, is a question of prudence and is not jurisdictional. *See Official Comm. Of Unsecured Creditors of Color Tile Inc. v. Coopers and Lybrand, LLP,* 322 F.3d 147, 159 (2d Cir. 2003). The availability of a loss of consortium claim to a spouse of a nonseaman while on the high seas is a "pure question of law." *Murray v. Anthony J. Bertucci Const. Co., Inc.,* 958 F.2d 127 (5th Cir. 1992). A district court has broad discretion to address a purely legal issue. *J.C. v. Regional School Dist. 10 Bd. of Educ.,* 278 F.3d 119, 125 (2d Cir. 2002).

Graske raised the issue of the viability of a loss of consortium claim by denying liability for Petitioner's loss of consortium claim in the district court (Petitioner's App. 60). He also raised the issue in his

Motion to Amend Findings of Fact and Conclusions of Law (*Id.* 59). Both parties briefed the issue before the district court made its final ruling and the district court addressed the issue on the merits (*Id.* 60-65). Furthermore, the parties were given a second opportunity to brief and argue the issue in the appeal to the Eighth Circuit. The Eighth Circuit also addressed the issue on the merits (*Id.* 11-19). Where the parties have had a full opportunity to address a pure question of law, a court does not abuse its discretion when it addresses the issue, even if it is first raised on appeal. *Murray,* 958 F.2d at 129 and *Nelson v. City of Moss Point, Mississippi,* 674 F.2d 379, 387 n.13 (5th Cir. 1982), *rev'd en banc on other grounds,* 701 F.2d 556 (5th Cir. 1983).

The district court and the Eighth Circuit acted within their discretionary powers in addressing the loss of consortium issue. Graske did not waive this defense.

CONCLUSION

Only two circuit courts have addressed the availability of loss of consortium damages arising out of non-fatal injuries to a nonseafarer sustained beyond the territorial waters of the United States. Both of those courts agree that federal maritime law does not allow recovery. Congressional enactments, although not preemptive, provide guidance in the development of federal maritime common law. These

congressional enactments provide the underlying principles upon which the Eighth Circuit Court of Appeals' decision was based.

The Eighth Circuit Court of Appeals' decision does not conflict with a decision of any other circuit court and conforms to relevant decisions of this Court. Anne Doyle's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

ANNE DOYLE,

Petitioner,

v.

LELAND GRASKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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REPLY BRIEF

The inconsistent, incomplete analysis found in the Brief in Opposition reflects the state of the law in the lower courts. It has been thirty years since this Court's decision in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673 (1980), twenty years since *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), and nine years since *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 121 S.Ct. 1927 (2001). Despite the passage of time, there is still confusion and inconsistency in the lower courts regarding loss of consortium damages for injuries to nonseafarers. There is also confusion regarding the use of state law remedies in admiralty cases. Consideration of this case will allow this Court to resolve the confusion surrounding these important issues.

ARGUMENT

Graske argues that there is no split among the circuits. He states that only the Ninth and Fifth Circuits have addressed the issue of loss of consortium damages for injury to a nonseafarer. However, his argument unravels because the Fifth Circuit decision he relies on, *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994), involves an injury to a longshoreman. Graske himself recognizes that a longshoreman is not included in the definition of a nonseafarer. Brief in Opposition, p.1, n.1. Thus,

Graske is left with only the Ninth Circuit as having rendered a decision within his narrow formulation of the issue. However, even that position is inaccurate.

Graske cannot avoid the impact of the decision in *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2nd Cir. 1994). The decision of this Court in *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S.Ct. 629 (1996) did not change the law in the Second Circuit regarding loss of consortium damages under general maritime law. As recognized by the Court in *Wartman v. Commodore Cruise Line, Ltd.*, 100 F.3d 943, 1996 WL 47964 (2nd Cir. 1996), loss of consortium damages are available for an injury to a nonseafarer. Thus, even if one accepts Graske's narrow framing of the issue, there is a split between the Ninth Circuit and the Second Circuit.

To avoid the impact of the decisions by the First Circuit and the Third Circuit, Graske tries to frame the issue narrowly. However, the issue in this case is not so narrow. This case presents one aspect of a larger issue: what is the scope of the remedies available for negligence under general maritime law?

This Court addressed one aspect of this larger issue in *Garris*, supra. Paraphrasing Justice Scalia: "The question presented in this case is whether the negligent breach of a general maritime duty of care is actionable when it causes [loss of consortium], as it is when it causes injury." *id* at 532 U.S. 812. This issue needs to be addressed by this Court because of the inconsistent decisions by the lower courts.

The reasoning applied in *Garris* is equally applicable to this case. In *Garris* this Court recognized a wrongful death action for negligence because it was not prohibited by any of the maritime statutes. Likewise, Anne Doyle has a cause of action for her loss of consortium because it is not prohibited by any of the maritime statutes. The courts that have decided otherwise are simply ignoring the principles set forth in the *Garris* decision.

Just as he ignores the *Garris* decision, Graske also ignores the criticism of the Ninth Circuit's decision in *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994). For instance, on page 14 of his Brief, Graske quotes from Thomas J. Schoenbaum, *1 Admiralty and Mar. Law* §5-16 (4th ed.). However, he fails to address the totality of Professor Schoenbaum's opinion on this issue:

> Thus, the state of the law at the present time seems to be that loss of society/consortium is not available under the general maritime law, but may be recovered under the *Yamaha* doctrine for deaths and injuries in state waters. **This is untenable, however.** First, the important maritime value of uniformity is offended by such a rule. Second, the view that loss of society is not available under the general maritime law misconstrues the Supreme Court's holding in *Miles*. The better view is that loss of consortium and society are recoverable under the general maritime law except in actions by seaman against their employers and where

> the cause of action is based on a statute that precludes such damages. (emphasis added)

Professor Schoenbaum also agrees that there is confusion in the lower courts regarding loss of consortium under general maritime law.

Graske's argument regarding the applicability of state law in this case simply highlights another issue that should be addressed by this Court. As this Court has observed:

> The federal cast of admiralty law, we have observed, means that 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope.' . . . Our precedent does not precisely delineate that scope.

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, at 210, n.8, 116 S.Ct. 619 (1996) (citing *Romero v. International Terminal Operating Co.*, 385 U.S. 354, at 373, 79 S.Ct. 468 (1959)).

One of the unique aspects of this case is that the Doyles and Graske are private citizens of the same state. Whether it is recognition of Nebraska's strong interest in remedies for torts between its own citizens, or under a choice of law analysis, it is evident that Nebraska law should be utilized to supplement the remedies under general maritime law in this case. Pet. App. 64-65. Thus, this case presents a unique opportunity to address an important aspect

of this Court's admiralty jurisdiction: defining the delicate balance between state law and federal maritime law.

CONCLUSION

There is a split among the courts of appeals regarding the availability of a remedy for loss of consortium under general maritime law. It has been many years since this Court's decisions in *Alvez* and *Miles*. Despite the clarification provided in *Garris*, confusion reigns in the lower courts. Part of this confusion includes the scope of state law remedies under federal admiralty law. Anne Doyle's Petition for Writ of Certiorari should be granted so that this Court can provide direction to the lower courts, and alleviate the inconsistent decisions of the lower courts regarding these issues.

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